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IN THE

Supreme Court of the United States

No. 439

IRENE SMITH CLIETT, ET VIR, *Petitioners*

v.

JEFF SCOTT, ET AL., *Respondent*

PETITION FOR WRIT OF CERTIORARI
To the U. S. Court of Appeals, Fifth Circuit

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ALPHA LAW BRIEF CO., 402 M & M BLDG., HOUSTON 2

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IN THE

Supreme Court of the United States

No._____

IRENE SMITH CLIETT, ET VIR, *Petitioners*

v.

JEFF SCOTT, ET AL., *Respondent*

PETITION FOR WRIT OF CERTIORARI
To the U. S. Court of Appeals, Fifth Circuit

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners pray that writ of certiorari issue to review the judgment of the U. S. Court of Appeals, 5th Circuit at New Orleans, in the above cause affirming the judgment of the U. S. District Court for the Southern District of Texas, at Houston. The trial court entered its judgment on June 6, 1955 and filed findings of fact and conclusions of law under Rule 52 of Federal Rules of Civil Procedure (T.R. 673-682).

The U. S. Court of Appeals, 5th Circuit, affirmed the judgment of the trial court on May 15, 1956, which judgment was entered on said date. A copy of the opinion of the Court of Appeals and the judgment of said court are set forth in the appendix to this application.

Jurisdiction

The date of the order of the U. S. Court of appeals, 5th Circuit, denying petitioners' motion for rehearing in that court was June 26, 1956. A copy of petitioners' motion for rehearing and brief thereon appears in the record certified to by the Clerk of the U. S. Court of Appeals, 5th Circuit.

The jurisdiction of this court is invoked under 28 *U.S.C.A.* Sec. 1254(1).

Questions Presented

I.

Petitioners originally filed this suit in the District Court of Waller County, Texas. No service of process was had on the respondents. After six years, respondents voluntarily answered said suit and filed a cross-action for $17,500.00. Admittedly, they had a right to file a petition at said time to remove said suit to the Federal Court. They elected to invoke the jurisdiction of the State Court in which to litigate their cross-action.

Three years later, petitioners amended their complaint and for the first time set up a count in trespass to try title, and carried forward the original suit in its entirety. Respondents then filed a petition for removal, and after removal, petitioners filed a motion to remand, which was overruled.

It is petitioners' contention that under the applicable law (28 *U.S.C.A.* Sections 1441 and 1446), the right of removal from a state court to a federal court is peculiarly and only for a defendant who is involuntarily and against his will brought into the state court. Such right is not

for a cross-plaintiff who chooses the state court as the forum for his litigation by voluntarily filing a cross-action therein. It is petitioners' further contention that respondents, by voluntarily filing their cross-action for $17,500.00 in the District Court of Waller County, became plaintiffs in their turn, and invoked the jurisdiction of the state court to hear said claim. By not filing a petition for removal prior to the filing of their cross-action, respondents forever lost such right of removal.

II.

The petitioners' act in filing an amended complaint in the state court, including therein for the first time a count in trespass to try title to the lands in controversy along with their entire original cause of action, did not revive the respondents' right of removal from the state court to the federal court. It is petitioners' earnest contention that once having become plaintiffs by filing their cross-action for $17,500.00, the respondents, by not exercising the admitted right of removal to the federal court at said time, such right of removal was lost forever. The filing by the original plaintiffs of an amended petition setting up in part a new cause of action did not revive such right of removal, because such right is solely for defendants involuntarily brought into a state court. Such right is not for cross-plaintiffs who voluntarily invoke the jurisdiction of a state court to litigate their claims therein.

Federal Question Invoked

The construction of 28 *U. S. C. A.*, Sections 1441 and 1446, as applicable to the facts in this case present a federal question to be determined by this honorable court.

Statement of the Case

This suit originated in the District Court of Waller County, Texas, where it was filed on March 7, 1941 by Irene Smith Cliett, joined by her husband, J. M. Cliett, against Flora Scott, et al. This suit, as originally filed, was for the recovery of $6,084.08, representing money paid by the petitioner, Irene Smith Cliett, out of her separate funds on the purchase price, including payment on mortgage indebtedness of the property in controversy (about 700 acres of land), taxes paid by her on said property, and cost of necessary improvements, upkeep and maintenance (T.R. 26-38). The purpose of this suit was to determine the legal effect of a judgment rendered on March 14, 1938 by the U. S. District Court for the Southern District of Texas, at Houston, and affirmed by the U. S. Court of Appeals, 5th Circuit, in March, 1939, upon the question of the right of Irene Smith Cliett to recover for said money advanced for the purchase price and for the benefit of said property prior to March 14, 1938, which the judgment of the trial court did not attempt to adjudicate. (Reference is made to two opinions of the U. S. Court of Appeals, 84 Fed. 2d 489, 102 Fed. 2d 725.)

The following facts are uncontradicted:

1. That the petitioners in this cause are resident citizens of the State of Texas and all of the respondents are non-resident citizens.

2. At the time the respondents voluntarily filed their answer and cross-action on September 29, 1947, without ever having been served with process, there was more than $3000.00 in controversy, and said suit was accordingly removable at that time to the Federal Court.

3. The respondents did not attempt to remove the case to the Federal Court, but chose to answer fully to the merits and filed a cross-action against the petitioners for $7500.00 for alleged rents collected on the property in controversy, and $10,000.00 for use of the property in controversy by petitioners (T.R. 38-53), thereby invoking the jurisdiction of the state court to hear their cross-action.

4. On March 24, 1951, petitioners filed an amended petition adding to their original cause of action a count in trespass to try title to the same property described in their original petition, and in the alternative sued for a partition in the event it should be found, upon the trial of said case, that petitioners only owned an undivided one-half interest in said property. Petitioners carried forward their original cause of action in its entirety (T.R. 53-66).

5. The respondents timely filed petition for removal to the Federal Court (T.R. 21-26).

6. Petitioners timely filed a motion to remand the case to the State Court (T.R. 69-76).

7. The trial court, in a memorandum opinion, overruled said motion to remand and entered an order to that effect (T.R. 82-85). (See appendix)

The trial court held that petitioners' first amended petition stated in part a new cause of action, and that the case was removable to the Federal Court, notwithstanding that (a) the case was removable when respondents filed their original answer and cross-action on September 27, 1947; and notwithstanding that (b) the respondents voluntarily and without ever having been served with process and more than six years after the suit was filed, invoked the jurisdiction of the State Court for the prosecution of its own cause

of action against petitioners in the amount of $7500.00 for rents alleged to have been collected by petitioners, and $10,000.00 alleged to be owing the respondents by petitioners for use of respondents' land; and notwithstanding that (c) the respondents made no attempt to remove said suit to the Federal Court when they voluntarily and of their own free will filed their cross-action, thereby invoking the jurisdiction of the State Court for all purposes as actors and cross-plaintiffs.

The U. S. Court of Appeals, 5th Circuit, affirmed the judgment of the trial court.

Reasons for Granting the Writ

The precise point of law involved in this case is whether or not a non-resident defendant's right of removal from a state court to a Federal court is revived by plaintiffs' filing a new count in his cause of action after said defendant has invoked the jurisdiction of the state court by filing a cross-action therein and thereby becoming a plaintiff in his own turn. The determination of this federal question requires a proper construction of 28 *U. S. C. A.*, Sections 1441 and 1446. (See appendix)

This is an important point of federal law that has not been decided by this Honorable Court and that this Court should review the decision of the U. S. Court of Appeals for the 5th Circuit herein, and thereby settle this vital point.

Likewise, this exact point of federal law has never been adjudicated by a U. S. Court of Appeals prior to this decision. We submit the cases cited by the U. S. Court of Appeals for the 5th Circuit in support of its decision are not in point as we will hereinafter demonstrate.

We further submit that the construction placed upon 28 *U. S. C. A.*, Sections 1441 and 1446 by the U. S. Court of Appeals in this case is contrary to and in conflict with the construction placed upon said Statute by this Honorable Court in the following cases, which we will hereinafter demonstrate:

Charles W. West, et al. v. City of Aurora, 6 Wall. 139, 18 L.E. 819;
Merchants Heat & Light Co. v. James B. Clow & Sons, 204 U.S. 286, 27 Sup. Ct. 285, 51 L.E. 488;
Texas & Pacific Railway Co., et al. v. Eastin & Knox, et al., 214 U.S. 153, 29 Supreme Court 564, 53 L.E. 946.

It is obvious from reading the opinion of the U. S. Court of Appeals that said court made no distinction whatsoever between the defendant who *involuntarily* submits himself to the jurisdiction of a state court after service of process upon him, and a defendant who actually invokes the jurisdiction of the state court as the tribunal to litigate his own cause of action.

The decisions cited by the U. S. Court of Appeals, 5th Circuit, in support of its decision simply enunciates the well established principle of law that where a defendant is invountarily brought into a state court and files an answer therein, he is only answering the specific cause of action sued upon. Accordingly, should the plaintiff change or add to his cause of action, the defendant obviously has a right of removal. However, this is only true where the defendant has not filed a cross-action and thereby invokes the jurisdiction of the state court. None of the U. S. Court of Appeals cases cited pass on the effect of a defendant filing a cross-action prior to removal.

The cases cited by the Court of Appeals herein go no further than to hold that where a defendant submits himself to the jurisdiction of a state court by filing an answer, he has a right of removal if and when the plaintiff files a new and independent cause of action. To hold otherwise would work a grave injustice on a defendant, who, after service of process on him, files an answer submitting himself only to the cause of action sued upon.

This Honorable Court recognizes this vital and controlling distinction in the case of *Merchants Heat & Light Company v. James B. Clow & Sons* (Supra). Speaking through Mr. Justice Holmes, the Court said:

> "But by setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action and, by invoking, submitted to it. It is true that the counterclaim seems to have arisen wholly out of the same transaction that the plaintiff sued upon, and so to have been in recoupment rather than in setoff proper. . . . *This single fact shows that the defendant, if he elects to sue upon his claim in the action against him, assumes the position of an actor and must take the consequences. The right to do so is of modern growth, and is merely a convenience that saves bringing another suit, not a necessity of the defense.*" (Italics is ours)
>
> "As we have said, there is no question at the present day that, by an answer in recoupment, the defendant makes himself an actor, and to the extent of his claim, a cross plaintiff in the suit."

This important distinction was clearly recognized by this Honorable Court in the case of *Charles W. West, et al. v. The City of Aurora.* This Court, speaking through Mr. Chief Justice Chase, stated:

"The right of removal is given only to a defendant who has not submitted himself to that jurisdiction; not to an original plaintiff in a state court who, by resorting to that jurisdiction, has become liable under the state laws to a cross action.

"*And it is given only to a defendant who promptly avails himself of the right at the time of the appearance, by declining to plead and filing his petition for removal.* (Italics ours)

"In the case before us, West and Torrence, citizens of Ohio, voluntarily resorted, as plaintiffs, to the state court of Indiana. They were bound to know of what rights the defendants to their suit might avail themselves under the Code. Submitting themselves to the jurisdiction they submitted themselves to it in its whole extent. The filing of the new paragraphs, therefore, could not make them defendants to a suit, removable on their application to the circuit court of the United States.

"A suit removable from a state court must be a suit regularly commenced by a citizen of the state in which the suit is brought, *by process served upon a defendant who is a citizen of another state, and who, if he does not elect to remove, is bound to submit to the jurisdiction of the state court.*" (Italics ours)

Likewise, this important distinction was recognized by this Honorable Court in the case of *Texas & Pacific Railway Company v. Eastin.* This case holds that where a nonresident defendant invokes the jurisdiction of the state court for his own account and for his own purpose, he has no right of removal, and cites in support thereof *Merchants Heat & Light Company v. J. B. Clow & Son* (Supra). In this case, this Honorable Court, speaking through Justice McKenna, said:

> "It would be carrying too far the right of a party who has petitioned for removal of a case to extend it beyond what is necessary to defend against the cause of action asserted against him. He should not be permitted to invoke the jurisdiction for affirmative relief and deny it afterwards. It must be remembered how amply his right of removal is protected. He may file the record in the circuit court of the United States, and thereby completely take jurisdiction from the state court.
>
> "Judgment affirmed."

In this case we have the converse of the facts in the case of *Charles W. West, et al. v. The City of Aurora.* In that case, the plaintiff, a non-resident, filed a suit, and after a cross-action was filed against it, it wanted to remove the case to the federal court. Such removal was not permitted because the rule is only designed for defendants who have not invoked the jurisdiction of the state court.

In this case, the respondents, without having been served with process, filed a cross-action for $17,500.00 and thereby clearly invoked the jurisdiction of the state court for the purpose of litigating their claim. Such action on respondents' part constituted them plaintiffs within the purview of all three of the above mentioned cases rendered by this Honorable Court. Having become a plaintiff, the respondent had no right of removal.

We see no genuine distinction between the facts in the *West* case and in this case except that the litigation was started by the plaintiffs in the *West* case, whereas in this case, it was not begun by the defendants (respondents). In each case, right of removal was demanded by the party who

claiming affirmative relief in the state court. It was denied in the *West* case and should be denied in this case.

In this case, there is no question that the respondents invoked the jurisdiction of the state court for affirmative relief by filing their cross-action. *As held in the foregoing cases, respondents cannot invoke the jurisdiction of the state court for affirmative relief and deny it afterwards.*

The decision in this case cannot possibly be reconciled with the holdings of this Honorable Court in the above mentioned three cases.

Conclusion

This Honorable Court should grant this petition for Writ of Certiorari to the United States Court of Appeals, 5th Circuit, for the following reasons:

1. The exact point of law involved herein was never adjudicated by a U. S. Court of Appeals until the decision herein.
2. The precise question involved herein is one of federal law which has not been but should be settled by this Honorable Court.
3. In rendering the decision herein, the U. S. Court of Appeals, 5th Circuit, has decided a federal question in a way in conflict with applicable decisions of this Court hereinbefore cited.
4. The cases cited by the U. S. Court of Appeals, 5th Circuit, in support of its decision herein are not in point.

5. It is very vital to the jurisprudence of the United States that this Honorable Court determine the question of federal law involved herein.

WHEREFORE, PREMISES CONSIDERED, we pray that this petition for Writ of Certiorari be granted.

Respectfully submitted,

FRANK O. BARNES
SAM G. CROOM

By_____
Attorneys for Petitioners
619 San Jacinto Bldg.
Houston 2, Texas

A copy of the foregoing petition was mailed to counsel for respondents, W. H. Betts, Hempstead, Texas, on this the_____day of September, 1956.

_____
Attorneys for Petitioners

APPENDIX I

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15834

IRENE SMITH CLIETT and J. M. CLIETT,
Appellants and Appellees,
VERSUS
JEFF SCOTT, REED SCOTT, BERTHA SCOTT, and
MAMIE S. HAMMONDS,
Appellees and Appellants

(AND REVERSE TITLE)

Appeals from the United States District Court for the Southern District of Texas

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(May 15, 1956.)

Before HUTCHESON, Chief Judge, and RIVES and BROWN, Circuit Judges.

HUTCHESON, Chief Judge: Begun in the District Court of Waller County, Texas, on March 7, 1941 the

suit had for its object the recovery from the defendants, all non-residents of the State of Texas, of moneys paid by the plaintiff, Irene Smith Cliett, on account of the property described in the petition, consisting of about 700 acres of land.

Based upon a judgment, declaring that plaintiffs and defendants were joint owners of the property, rendered on March 14, 1938, by the United States District Court for the Southern District of Texas, and affirmed by this court in March, 1939, *Cliett v. Scott, et al.*, 102 F. 2d 725, the suit sought a judgment for the amounts claimed and a lien upon defendants' half interest in the property to secure their payment.

On September 29, 1947, over six years after the suit was filed, the defendants filed an answer to plaintiffs' suit, denying their claims and a counter claim which, acknowledging that the property was jointly owned, sought an accounting from plaintiffs for amounts due to them by plaintiffs for the use and occupation of the property.

On March 24, 1951, the plaintiffs filed a first amended petition. In and by it they sued in trespass to try title, claiming title by limitation to all the property in controversy, and in the alternative, only, reasserting their original claim for a money recovery.

Thereupon defendants filed their petition for removal, and the suit was removed into the United States District Court for the Southern District of Texas, the court in which the rights of the parties in the land had been earlier declared and established.

On April 24, 1951, plaintiffs filed their motion to remand on the ground that the defendants had voluntarily submitted to the jurisdiction of the state court and had lost their right to remove.

The district court, pointing out in a memorandum opinion that, though, by appearing and answering the original petition, the defendants did submit themselves to jurisdiction of the state court with respect to the claim asserted therein, the amended petition set up an entirely new and completely different claim, and defendants then became and were entitled to remove.

On Dec. 5, 1951, defendants filed a motion for summary judgment, and after being fully heard and argued, the motion was sustained and judgment entered for defendants as to the claim of plaintiffs that they had acquired title by limitation to the whole of the land.

In a carefully written and correctly argued opinion, the district judge took note of the previous litigation in the federal court, *Scott v. Smith*, 84 F. 2d 489 and *Cliett v. Scott*, 102 F. 2d 725, which had ended in a judgment vesting title in plaintiffs and defendants, one-half in each, and that, on March 7, 1941, plaintiffs, not claiming the lands as their own but as jointly owned with defendants, had filed, and for ten years had maintained, a suit for an accounting for moneys claimed to have been expended in the joint interest of the co-owners with a lien to be fixed on defendant's one-half interest in the land. Holding under Texas law, established in the host of cases cited by him, beginning with *Word v. Drouthett*, 44 Texas, 369, and concluding with *Delaney v. Padgett*, 193 Fed. 2d 807, that by thus admitting ownership of a half interest

with the defendants in the land plaintiffs were prevented from claiming that they had held the land adversely, he correctly held that the plaintiffs had not in the ten year period claimed by them acquired a limitation title against the defendants. Entering judgment accordingly, he reserved for further action the claims of the respective parties against each other for an accounting growing out of the use and possession of, and the improvements made and moneys expended, on and in respect of the land.

Thereafter, a full accounting having been had, the district judge, canvassing the respective contentions of the parties and fully appraising them, found and concluded that sums were due from each to each in amounts which in effect offset each other, and that neither plaintiffs nor defendants were entitled to a money judgment against the other. So concluding, he ordered a partition of the property, appointed commissioners to effect it, and taxed the costs one-half against each.

Appealing from the judgment, plaintiffs are here urging upon us that the decree must be reversed because it was error (1) not to remand the cause to the state court; (2) to determine on summary judgment and as matter of law that plaintiffs had not perfected title by limitation; and (3) to find in effect that the claims due plaintiffs by defendants were offset by the claims due defendants by plaintiffs.

On their part, defendants are here insisting that the judgment should be affirmed, except on their cross-appeal which alleges error in the accounting and seeks an affirmative judgment in their favor.

On the issue of remand, appellants' reliance is placed wholly in the fact, that the removal statute, Sec. 1441, Title 28 U.S.C., accords the right to remove to defendants only, and the claim that defendants, having not only submitted to the jurisdiction of the state court but having invoked its jurisdiction by becoming cross-plaintiffs, ceased to be defendants and became in effect plaintiffs.

The appellees' position is, and that of the district judge was, that while defendants did consent to the jurisdiction of the state court over the claim for accounting filed by plaintiffs, and did file a counter claim, either permissive or compulsory, this did not change or affect their status as defendants, and under settled law, when plaintiffs filed an entirely new and different suit, defendants' right to remove revived.

We think it clear that the position of appellee and the district judge is the correct one. While there is some confusion in the authorities as to the effect on removal of the filing of a cross action,[1] it is well settled that a claim of the kind filed in this case by the defendants against the original plaintiffs was not such an independent suit as to affect the right to remove, and the authorities are overwhelming that, though a defendant has submitted himself to state court jurisdiction on one cause of action, this does not prevent his removing the cause when an entirely new and different cause of action[2] is filed.

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[1] 45 Am. Jur., "Removal" Sec. 15, p. 817; Habermel v. Mong, 31 F (2) 822. Cf. Chicago, R.I. & P. v. Stude, 346 U.S. 574.

[2] Evans v. Dillingham, 43 Fed. 417; Mattoon v. Reynolds, 62 Fed. 417; Henderson, et al. v. Midwest Refining Co., 43 F (2) 23, 25; Baron v. Brown, 83 Fed. Supp. 520.

On the other issues raised, little need be said. We find ourselves in full agreement with the district judge on the issue of limitation. Indeed we think it is too clear on principle and on authority to admit of discussion that plaintiffs cannot after formally admitting in their pleadings filed in court that the defendants are co-tenants with them, later claim that during the period that such pleadings were on file their claim was adverse.

When finally we come to the judgment on accounting, with which both plaintiffs and defendants disagree, we think it clear: that the matters considered and determined, with their countervailing equities, were matters of equitable cognizance which, under the facts in this case, including the long prior litigation, the chancellor was peculiarly fitted to assay and determine; and that his conclusion, to leave the parties where the decision of the federal court in 1938 had left them, as co-tenants and as having completely offsetting rights against each other, was a wise and sound conclusion and should not be disturbed.

The judgment is, therefore, AFFIRMED.

A True Copy:
Teste:

JOHN A. FEEHAN, JR.
Clerk of the United States Court of Appeals for the Fifth Circuit.

APPENDIX II

Judgment

Extract from the Minutes of May 15, 1956

No. 15834

IRENE SMITH CLIETT and J. M. CLIETT,
VERSUS
JEFF SCOTT, REED SCOTT, BERTHA SCOTT, and
MAMIE S. HAMMONDS,

(AND REVERSE TITLE)

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants and appellees, Irene Smith Cliett and J. M. Cliett, and the surety on their appeal bond herein, Columbia Casualty Company, be condemned, in solido, to pay one-half of the costs of this cause in this Court; and that the appellees and appellants, Jeff Scott, Reed Scott, Bertha Scott, and Mamie S. Hammonds, and the surety on their appeal bond herein, Maryland Casualty Company, be condemned, in solido, to pay one-half of the costs of this cause in this Court, for all of which execution may be issued out of the said District Court.

APPENDIX III

Sec. 1441 of Title 28, U.S.C.A. reads as follows:

"(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

"(b) Not pertinent.

"(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction. June 25, 1948, c. 646, 62 Stat. 937."

Sec. 1446 of Title 28, U.S.C.A., provides:

"1446. *Procedure for removal*

"(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

"(b) The petition for removal of a civil action or proceeding shall be filed within twenty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within twenty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

"If the case stated by the initial pleading is not removable, a petition for removal may be filed within twenty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

"(c) Not pertinent.

"(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

"(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State Court which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

"(f) Not pertinent."

APPENDIX IV

Memorandum Opinion of the Trial Court Dated June 1, 1951 Overruling Petitioners' Motion to Remand

"*Memorandum:*-

This suit has been removed by defendants into this Court from a State Court. Plaintiffs have moved to remand. This is a hearing of such motion to remand.

The facts shown by the record and my comment thereon are as follows:-

(a) Plaintiffs' Original Petition filed in the State Court shows diversity of citizenship between all Plaintiffs and all Defendants. That there is such diversity of citizenship is in effect admitted in Defendants' Petition for Removal.

(b) Plaintiffs' Original Petition filed in the State Court alleges and shows (Paragraphs II, IV, V, VI, and the Prayer) that the matter then in controversy exceeded the sum or value of $3000, exclusive of interest and costs—a case removable under the Statute. In determining removability, Courts look to the allegations of Plaintiffs' Petition in the State Court, and do not inquire whether such allegations made in good faith are true or untrue.

(c) While the case was pending on such Original Petition, Defendants did not see fit to remove the case, but answered to the merits, joining issue on Plaintiffs' allegations in each of said paragraphs. Defendants also by cross action sought to recover $17,500.00 from Plaintiffs as moneys collected by her, rents, profits received by her, etc. on the lands described in Plaintiffs' Original Petition. Defendants

thereby fully submitted themselves to the jurisdiction of the State Court on the causes of action stated in such Original Petition and Defendants' Cross Action.

(d) On March 24, 1951, Plaintiffs filed their Amended Petition in the State Court. Viewing such Amended Complaint, wholly or in part, as a new or different cause of action, and one removable to this Court, Defendants removed the case into this Court, and Plaintiffs' Motion to Remand followed.

An examination of such Amended Petition shows that plaintiffs in their *First Count* set up an *entirely new* cause of action, i.e., a suit in Trespass to Try Title under the Texas Statutes. Alleging diversity of citizenship, they sue the same Defendants (except that it is alleged that the husband of Mamie Hammond is deceased and that Flora Scott is not only the surviving wife but the Administratrix of George Scott, deceased) for title and possession of certain lands in Waller County, Texas, apparently the same land, wholly or in part described in their Original Petition. Plaintiffs allege that they own such land not only under a regular chain of title from and under the sovereignty of the soil but under the Texas Three, Five and Ten Year Statutes of Limitation. They say they have been ejected by defendants, to their damage $25,000.

In their *Second Count*, Plaintiffs say that if they own only a one-half interest in such land, they in the alternative set up a substantially similar cause of action to that asserted in their Original Petition, and in addition they pray for Partition of such land.

I - I conclude that the cause of action presented in Plaintiffs' Amended Petition presents a case which is new

in part and was and is removable. And that Defendants, by answering in the State Court Plaintiffs' Original Petition, did not waive their right to remove.

It follows that plaintiffs' Motion to Remand should be denied. Let Order be drawn and presented accordingly.

(s) T. M. KENNERLY
Judge

Office - Supreme Court, U.S.
FILED
OCT 19 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

No. 439

IRENE SMITH CLIETT, ET VIR, *Petitioners*

v.

JEFF SCOTT, ET AL., *Respondents*

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS, FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

No. 439

IRENE SMITH CLIETT, ET VIR, *Petitioners*

v.

JEFF SCOTT, ET AL., *Respondents*

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS, FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Opinions and Judgments Below

The opinion of the United States Court of Appeals, Fifth Circuit, is reported in —— F. 2d ——, and appears as Appendix I to the Petition for Writ of Certiorari herein. The memorandum opinion of the United States District Court, overruling Petitioners' Motion to Remand, appears as Appendix IV to the Petition for Writ of Certiorari herein.

Jurisdiction

The opinion of the United States Court of Appeals was rendered and entered on May 15, 1956, as was the judgment of that Court affirming the United States District

Court. Petition for Writ of Certiorari was filed herein on September 21, 1956; invoking the jurisdiction of this Court under 28 *U.S.C.A.*, Sec. 1254 (1).

Questions Presented

1. Whether the United States Court of Appeals correctly found and held herein that when Petitioners, in and by their amended complaint, sued Respondent (all of whom were non-residents of the State of Texas) upon an entirely new and different cause of action, Respondents were entitled to remove such suit to the Federal Court although they had theretofore answered the original complaint or petition in the State Court and asserted counter-claims and offsets thereto.

2. Whether the United States Court of Appeals correctly found and held herein that the Respondents continued to be "Defendants" in the State Court, within the meaning of 28 *U.S.C.A.*, 1441 (a), as to new and different causes of action therein asserted against them by amended pleadings, although they had answered the original petition or complaint and had plead counter-claims and offsets as to the cause of action asserted in the Petitioners' original petition or complaint in the State Court.

Statutes and Regulations Involved

28 U.S.C.A. 1441.

Statement

I.

The record in this case shows:

1. The pertinent facts found herein by the courts below may be summarized as follows:

(a) The U. S. District Court: Petitioners' original complaint or petition filed in the State Court shows diversitive citizenship between all Plaintiffs and all Defendants; that the matter placed in controversy by Petitioners' original petition filed in the State Court exceeds the sum or value of Three Thousand and No/100ths Dollars, exclusive of interest and costs; and that Respondents did not seek to remove the cause or causes of action complained of in Petitioners' *original* petition in the State Court, but answered to the merits thereof and asserted therein a cross-action for rents and profits received by Petitioners from the subject lands, and thereby submitted themselves to the jurisdiction of the State Court "on the causes of action stated in such *Original* Petition" filed by Petitioners in the State Court and thus asserted by Respondents therein. (Italics ours).

That subsequently and on March 24, 1951, Petitioners filed their *amended* petition in the State Court, by and in which said Petitioners "set up an *entirely new* cause of action, i.e., a suit in Trespass to Try Title under the Texas Statutes", and in the alternative they sought the additional remedy of partition.

That the cause of action presented in said Petitioners' amended petition or complaint filed in the State Court presented "a cause which is new in part and was and is removable. And that Defendants (respondents), by answering in the State Court Plaintiffs' (petitioners) original petition, did not waive their right to remove." (R. 82-5).

(b) The U. S. Court of Appeals, Fifth Circuit: That Respondents did not change their technical designation as "*Defendants*" within the meaning of 28 *U.S.C.A.*, Sec. 1441 (a) to that of *Plaintiff* by asserting a counter-claim

and offset to Petitioners' original complaint filed in the State Court, so as to be precluded from removing such suit to the Federal Court upon the subsequent filing of an amended petition by Petitioners in the State Court which asserted a new and different cause of action.

That the counter-claim filed by Respondents in the State Court "was not such an independent suit as to affect the right to remove" such suit upon the filing of the amended petition therein by Petitioners herein.

That although Respondents had submitted themselves to the State Court's jurisdiction on the cause of action asserted by Petitioners in their original petition in the State Court, this did not prevent Respondents from removing the cause when the entirely new and different cause of action was subsequently asserted by Petitioners in their amended petition, filed in the State Court March 24, 1951. (Appendix I, Petition for Writ of Certiorari).

2. This suit was originally filed by the Petitioners in the State District Court of Waller County, Texas, on March 7, 1941, against Flora Scott, et al., all of whom were non-residents of the State of Texas and the sole surviving heirs-at-law of George Scott, deceased. In the original petition or complaint of Petitioners so filed in said State Court, they therein asserted a right to be reimbursed for one-half of the purchase price paid for the lands therein referred to and for one-half of the costs of repairs and improvements and taxes paid upon such lands; which were the selfsame lands as constituted the subject matter of Cause No. 7891, *Scott, et al. versus Smith* (84 F. 2d 489), and Cause No. 8835, *Cliett versus Scott, et al.* (102 F. 2d 725, March 14, 1939), before the Honorable Court of Appeals, Fifth Circuit; and in which said cases, these Re-

spondents were decreed to be the owners of an undivided one-half interest in and to such lands, and in which said cases there was determined and adjudged, or there should have been determined and adjudged all issues with respect to any rights of the Petitioners herein to reimbursement for one-half of the purchase price, costs of the repairs and improvements and/or taxes paid upon the subject lands prior to March 14, 1938—the date of the second trial of said case in the United States District Court. In their *Original* Petition to the State Court therein, Petitioners did not challenge the validity of Respondents' title to an undivided one-half interest in said lands in their original petition to said State Court, but, on the contrary, recognized their said interest therein by claiming the aforesaid contributions; nor did Petitioners therein seek any partition of such lands between themselves and these Respondents. (R. 26-37).

On September 29, 1947, these Respondents filed their original answer to the original petition filed by Petitioners in the State Court and therein sought, as a counter-claim, an accounting for rents and revenues from the common lands of said parties constituting the subject matter of the Petitioners' petition therein. (R. 38-53).

Thereafter and on March 24, 1951, Petitioners, who were Plaintiffs in the State Court, filed their first *amended* original petition therein, and, for the first time, they asserted a statutory cause of action in trespass to try title and claimed a right to partition. *Such were entirely new causes of action and had not been theretofore asserted* by Petitioners. (R. 53-66). Whereupon, and on April 15, 1951, Respondents timely filed their petition for removal to the United States District Court for the Southern District of

Texas, at Houston, with appropriate bond (S.F. 21 and 66); Petitioners filed their motion to remand and the same was overruled by the above said United States District Court June 1, 1951. (R. 82-6).

Petitioners admit, yea, assert:

(a) That their original petition filed in the State Court had for its "sole purpose" the determination of the force and effect of the decrees of the United States District Court and the United States Court of Appeals, Fifth Circuit, in Equity Cause No. 639, "as to the rights of Plaintiffs (petitioners) to recover money spent by Irene Smith (now Cliett) on the purchase price of said properties and on the mortgage indebtedness and on the taxes from the date of George Scott's death in 1933 until final judgment in March, 1939."

(b) That the amended petition or complaint filed by Petitioners in the State Court on March 24, 1951, was an entirely new, different and distinct cause of action and "based on entirely distinct and different transactions and occurrences" from those complained of in Petitioners' original petition filed in said State Court (Petitioners' Brief in United States Court of Appeals, pp. 18 and 19, and Petition for Writ of Certiorari, p. 2).

Argument

The judgment of the Circuit Court of Appeals affirming the judgment of the District Court, overruling Petitioners' Motion to Remand is correct and is not in conflict with any other decision so as to warrant further review of the case by this Honorable Court; and such judgments of the Circuit Court of Appeals and of the District

Court in the instant case is in accord with and supported by the following authorities:

28 *U.S.C.A.* 1441;
Powers v. C. & O. Co., 169 U.S. 92, 18 S. Ct. 264;
Evans v. Dillingham (C.C.A.), 43 Fed. 177;
Mattoon v. Reynolds, 62 Fed. 417;
Henderson, et al. v. Midwest Refining Co. (10th C.C.A.), 43 Fed. 2d 23, 25;
Baron v. Brown (S. Dist. N.Y.), 83 Fed. Supp. 520;
Southern Pac. Co. v. Stewart, 13 S. E. 824;
Markantonatos v. Maryland Drydock Co. (D.C. N.Y. 1953), 110 Fed. Supp. 862;
Mackay v. Unita Development Co., 229 U.S. 173, 57 L. Ed. 1138;
Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 61 S. Ct. 872;
West v. City of Aurora, 6 *Wall.* 139, 18 L. Ed. 819.

In *Evans v. Dillingham, supra*, the original petition (filed September 13, 1889) in the State Court, sought injunction to prevent Dillingham, as Receiver for Houston & Texas Central Ry., from removing division headquarters of such Railway from Corsicana to Ennis. April 2, 1890 plaintiffs, filed "Second Amended Petition"; Dillingham filed petition (and bond) for removal April 7, 1890. This petition was granted by the State Court, and plaintiffs filed a Motion to Remand.

The Federal Circuit Court held that there was presented "a federal question, which defendant is entitled to have passed on by the United States Court, if he has not lost his right to remove by his delay in presenting his application therefor."

In holding that the petition for removal was filed in time, the court said (p. 180):

"There is no question in my mind that, where an amended petition makes a substantially different suit from the original petition, the limitation as to the time within which the petition for removal can be presented should relate to the new pleading of the plaintiff . . . I am of the opinion the defendant's application for removal was made in time, and the motion to remand will be refused."

In *Mattoon v. Reynolds*, supra; Mattoon and others sued Reynolds, a non-resident of Connecticut, in a State Court of Connecticut. Reynolds removed same to the Federal Court, and plaintiffs moved to remand the same. The Court therein found and said:

"The original complaint, in the state court, alleged that certain notes were given without consideration, and asked for an injunction restraining the defendant from negotiating said notes. After the time had expired within which the cause might originally have been removed, the plaintiffs filed a new count, alleging fraud, and asking for equitable relief, or for a judgment for $3,000 damages. In due season after the filing of the amended pleadings the defendant removed the cause to this court.

"The single question presented is whether, by the filing of the substituted complaint, the defendant acquired a right of removal. The determination of this question depends upon whether the amended complaint states a new and different cause of action, and one in which the original suit is merged. Yarde v. Railroad Co., 57 Fed. 913; Huskins v. R. R. Co., 37 Fed. 507; Evans v. Dillingham, 43 Fed. 177; State of Texas v. Day Land & Cattle Co., 49 Fed. 593, 596. It is clear that in this case the second count presents a distinct cause of action—fraud, calling for a distinct remedy at law; money damages. The allegations con-

tained in the first count (petition) and the relief therein prayed for are incorporated in the second count (petition).

"The motion to remand is denied."

In *Baron v. Brown*, supra; the defendants filed a counter-claim to the original petition, whereupon the plaintiffs therein amended their petition, and the defendants then and timely petitioned for removal. On Motion to Remand the Court found that the original petition alleged an action for specific performance of a contract for the purchase of a stock of merchandise; and the amended pleading alleged action for money damages for defendants' alleged breach of the contract to buy such stock of merchandise; and that under the New York law the second petition was "in the place and stead of their original complaint."

At 83 Fed. Supp. 521, the Court there held and said:

"The Federal Courts have held that where an amendment makes a substantially new complaint, the time to remove dates from the time of the service and filing of the amendment. Evans vs. Dillingham, C.C., 43 F. 177.

"Therefore, the filing of the petition to remove by the defendants some three days after the service of the supplemental complaint was timely."

Petitioners allege in their brief herein to the Circuit Court of Appeals that "The sole purpose of" the original suit filed in the State Court "was to determine the force and effect of the decrees of the trial court and this Honorable Court of Appeals of Equity, Cause No. 639 as to the rights of Plaintiffs . . ." (p. 18) and further asserted

that "The cause of action originally sued upon and the count in trespass to try title, . . . are two entirely different and independent suits and based upon entirely distinct and different transactions and occurrences." (p. 19). It is not perceived how there could be any basis for any contention on Petitioners' part or of a holding that the filing of their amended pleadings on March 24, 1951, did *not* constitute the assertion of an entirely new and independent cause of action, as was held by the District and Circuit Court of Appeals.

Assuming that the Respondents herein waived their right to remove said cause of action or actions in said original petition asserted by Petitioners herein; Respondents *did not waive their right to remove* to the Federal Court for determination *the new and independent causes of action* asserted by Petitioners in their amended pleadings filed March 24, 1951 any more than they might have waived their right to remove in a second and entirely different suit by having waived their right to remove in a prior suit filed by the same or different Plaintiffs. *Henderson v. Midwest Refining Co.;* 43 Fed. 2d 23, 25 (3, 4).

In *Henderson v. Midwest Refining Co.*, supra; the original petition alleged an equitable action in the nature of a trust. No petition for removal was then filed; but defendant's demurrer thereto was sustained. The *amended petition* alleged conspiracy, fraud and large damages.

In sustaining judgment overruling motion to remand, the Circuit Court of Appeals said (p. 25):

> "Defendant apparently was content to remain in the state court on the cause of action stated in the original petition, but that seems to be no reason for

> denying to it its right of removal of an entirely new and different cause of action pleaded in the so-called amended petition. Moreover, the time within which removal may be made is not jurisdictional, but 'modal and formal'. Ayers v. Watson, 113 U.S. 594, 5 S. Ct. 641, 28 L. Ed. 1093; Powers v. C. & O. Ry., 169 U.S. 92, 18 S. Ct. 264, 42 L. Ed. 673."

In *Powers v. Chesapeake & Ohio Ry. Co.* cited in the *Henderson* case, supra; this Court, in affirming the judgment of the Circuit Court, which held that when the plaintiff amended his pleadings and thereby dismissed a resident co-defendant of the railway company, the railway company was entitled to remove such cause to the Federal Court, even though it had theretofore joined issue on the merits in the State Court, this Court said:

> "The reasonable construction of the act of Congress, and *the only one which will prevent the right of removal,* to which the statute declares the party to be entitled, *from being defeated by circumstances wholly beyond his control,* is to hold that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right; and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought." (Italics ours)

Thus, it is seen that this Court has heretofore held that the removal statute may not be so construed as to permit a plaintiff to "bait" a defendant to answer and submit himself to the jurisdiction of the State Court by filing therein one cause of action; and thereafter amend his

pleadings and assert against such defendant a *new* cause of action; and yet require such defendant to submit to the jurisdiction of the State Court upon such new cause of action.

In *Mackay v. Unita Development Company*, 229 U.S. 173, 57 L. Ed. 1138, while not deciding that the defendant in the State Court remained the "defendant" although he asserted therein a counter-claim; this Court appeared to be of the same opinion as was the Court of Appeals herein; that is, that the original defendant in the State Court remained the "defendant" within the meaning of 28 *U.S.C.A.* 1441 (a), although he had filed a counter-claim or offset to the claims of the plaintiff in the State Court.

The aforesaid implied holding of this Court in the *Mackay* case was the *expressed holding* of this Court in the case of *Shamrock Oil and Gas Corporation v. Sheets*, 313 U.S. 100, 61 S. Ct. 868, 872. The Shamrock Oil and Gas Corporation, a Deleware corporation, sued Sheets et al., citizens of Texas, in the State Court for an amount in excess of $3000 for goods sold and delivered. The defendants therein filed a cross-action for setoff and demanded damages in a sum in excess of $3,000; prayed that the plaintiff therein take nothing, and that such defendants have judgment against the plaintiff on their cross-action in the amount of $7,200. Upon the filing of such setoff or cross-action, the Shamrock Oil and Gas Corporation filed a petition to remove the whole suit to the Federal Court on the ground of diversitive citizenship. The United States District Court overruled Sheets' Motion to Remand and rendered judgment on the merits in favor of the original plaintiff in the State Court (Shamrock Oil and Gas Corporation) and Sheets appealed. The United States Court of Appeals, Fifth Circuit, reversed the judgment of the

District Court overruling the Motion to Remand and *held* that although the original plaintiff in the State Court became a cross-defendant therein, it did not become a "defendant" within the meaning of the removal statute (28 *U.S.C.A.* 1441 (a), and that the right of removal was a right assertable only by the original defendant in the State Court. This Court granted an application for Writ of Certiorari and *affirmed such holding* of the Circuit Court of Appeals. Also therein this Court held that there was no distinction between the terms of the removal statute in effect at the time of the decision of this Court in *West, et al. v. City of Aurora,* 6 Wall. 139, 18 L. Ed. 819 (February 10, 1868) and the removal statute controlling in the *Shamrock* case, and which is now in effect. (Section 12 of the Judiciary Act of 1789, 1 Stat. 79). (61 S. Ct. 872 (4)

In *West v. City of Aurora,* 6 Wall. 139, 18 L. Ed. 819 (cited by Petitioners) this Court held that an amended answer "setting up new defensive matter" and praying for "an injunction to restrain the original plaintiffs (non-residents) from further proceeding in any suit on the coupons or bonds, and from transferring them to third parties, and for a decree that the bonds be delivered up to be cancelled," did not constitute such a new suit or cause of action by such defendant as would permit the plaintiffs, West et al., to dismiss their petition as plaintiff and remove such cause to the Federal Court. And *expressly held* that the right of removal was the right of *the defendant* and not of the plaintiff, although such plaintiff became a defendant or cross-defendant.

Thus, it seems clear to Respondents that this Court has heretofore determined that an original plaintiff in the State Court remains the "plaintiff" therein and the original

defendant in the State Court remains the "defendant" therein; notwithstanding the assertion therein of cross-actions, counter-claims or setoffs. And, therefore, the courts below in the instant case correctly held that the Respondents, although filing a cross-action for counter-claims and setoffs, remained the "defendant" in the State Court and that when the Petitioners (plaintiffs in the State Court) filed their amended pleadings asserting new and different causes of action, these Respondents were entitled to remove such cause to the Federal Court.

Reasons for Refusing the Writ

Petitioners contend that this Honorable Court should grant the writ prayed for herein: first, because this Court has not heretofore decided the point presented; and secondly, because the holding of the Circuit Court of Appeals in this case "is contrary to and in conflict with" the construction of 28 *U.S.C.A.*, Sections 1441 and 1446, by this Honorable Court in the following cases:

Charles W. West, et al. v. City of Aurora, 6 Wall. 139, 18 L. E. 819;
Merchants Heat & Light Co. v. James B. Clow & Sons, 204 U.S. 286, 27 Sup. Ct. 285, 51 L. E. 488;
Texas & Pacific Railway Co., et al. v. Eastin & Knox, et al., 214 U.S. 153, 29 Supreme Court 564, 53 L. E. 946.

The propositions made are, of course, *contradictory.* However, Respondents desire to point out the distinction between the instant case and the next above cases referred to by Petitioners.

In *West v. City of Aurora,* supra: West, et al., who were citizens of Ohio, brought this suit in the State Court of Indiana against the City of Aurora (Indiana) and were

the original plaintiffs therein. The City of Aurora, by amended pleadings, set up new defensive matter and prayed for an injunction, and for delivery of the bonds sued upon for cancellation. Thereupon, the original plaintiffs in the State Court removed the suit to the United States Circuit Court, which granted a Motion to Remand. This Court, in affirming the holding of the Circuit Court, held:

> "The right of removal is given only to a defendant who has not submitted himself to that jurisdiction; *not to an original plaintiff* in a State Court who, by resorting to that jurisdiction, has become liable under the state law to a cross-action." (Italics ours)

Thus, it is seen that the *West* case is distinguishable from the instant case in that it was the *original plaintiff* who sought to remove the case to the Federal Court, and not the original defendant, as in the instant case.

Merchants Heat & Light Co. v. James B. Clow & Sons, supra: The reported opinion does not reveal the facts and proceedings concerning the jurisdictional question, but it is believed that it may fairly be inferred that Clow and Sons, an Illinois corporation, brought this suit in the Illinois State Court against Merchants Heat and Light Company, an Indiana corporation; that the defendant therein "lost no rights by pleading to the merits, as required, after saving its rights"; that the defendant therein set up a counterclaim in the nature of recoupment rather than setoff—which was construed as a cross-demand, as distinguished from a defense—, and thereafter sought to remove the cause to the Federal Court.

This opinion as reported does not reflect, indeed does *not suggest*, that the plaintiff by subsequent and amended

pleadings in the State Court alleged or asserted new and different causes of action from those asserted in its original petition. Thus, it is seen that the basis upon which the Circuit Court and the District Court in the instant case held that the Respondents were entitled to remove this cause to the Federal Court, to-wit, the subsequent assertion by the plaintiff of *new* and different causes of action, was in nowise under consideration by this Court in the case of *Merchants Heat and Light Company v. Clow and Sons;* and that opinion could not be considered in conflict with the holding of the Circuit Court of Appeals in the instant case.

In *Texas & Pacific Ry. Co., et al. v. Eastin & Knox, et al.,* supra: Eastin, et al., sued the Texas & Pacific Co. and its resident agent for damages resulting from wrongful billing of a shipment of cattle. The Texas & Pacific Co. petitioned for removal to the Federal Court and alleged that its agent, Tucker, was improperly and unlawfully joined in the suit for the purpose of preventing removal thereof to the United States Circuit Court. The petition for removal was denied and exceptions taken and entered. The Texas & Pacific Co. continued its protest but filed an original answer and therein *impleaded* the St. Louis & San Francisco Railroad Company as a party-defendant, and by a second amended pleading alleged negligence on the part of the St. Louis & San Francisco Company and that the damage approximately resulted therefrom, and in the alternative prayed that it have judgment over and against the St. Louis & San Francisco Railroad Company for such judgment as might be rendered against it.

This Honorable Court therein held that the Texas & Pacific Railway Company "instituted *a cause of action*

against the St. Louis & San Francisco Railroad Company, *in which the defendant in error* (Eastin) *had no concern*, and recovered a judgment against that company for $1,800. *By doing so* they invoked the jurisdiction of the State Court on their own accord and for their own purpose . . ." (Italics ours).

In the *Texas & Pacific* case there was no question of subsequently asserted new cause of action; but in recognizing that the submission of a defendant to the jurisdiction of the State Court by making answer to a cause of action asserted against him in such State Court *is limited to that particular cause of action*, this Court therein said (214 U.S. 161, 53 L. Ed. 950):

> "It would be carrying too far the right of a party who has petitioned for removal of a case to extend it beyond what is necessary to defend against the cause of action asserted against him."

Conclusion

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

W. H. BETTS
P. O. Box 536
Hempstead, Texas
Attorney for Respondents

A copy of the foregoing brief has been mailed to counsel for Petitioners, Messrs. Frank O. Barnes and Sam G. Croom, 619 San Jacinto Building, Houston, Texas, on this 18 day of October, 1956.

Attorney for Respondents

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IN THE

Supreme Court of the United States

No. 439

IRENE SMITH CLIETT, ET VIR, *Petitioners*

v.

JEFF SCOTT, ET AL., *Respondents*

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

To the U. S. Court of Appeals, Fifth Circuit, Coupled With Motion to File Out of Time

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Motion to File Out of Time

Your petitioners, Irene Smith Cliett and her husband, J. M. Cliett, respectfully move this Honorable Court for leave to file out of time petition for rehearing of petition for writ of Certiorari to review judgment of the U. S. Court of Ap-

peals, Fifth Circuit at New Orleans in the above cause which was heretofore overruled by this Honorable Court, and as grounds therefor would say:

That the time for filing such petition for rehearing under the rules of this Court expired on December 14, 1956; that immediately upon receipt of notice that this Honorable Court had overruled the petition for writ of certiorari in the above cause, your petitioner, Irene Smith Cliett, had a long conference with her attorneys, Frank O. Barnes and Sam G. Croom of Houston, Texas, concerning the advisability of filing a petition for rehearing. Said attorneys read to her and discussed with her the requirements of Rule 58 of this Court for filing such petition, and unqualifiedly advised your petitioner that in their opinion, they had no grounds for such rehearing under said Rule, and that the filing of such petition would be construed as being for delay only, and would not come within the purview of Rule 58.

Your petitioner, Irene Smith Cliett, could not bear the idea of losing one-half interest in her 700 acres of land that she had bought with her hard earned money over 25 years ago, and to which she had held duly recorded deeds since such time, without exhausting every available remedy for relief.

In desperation, your petitioner, Irene Smith Cliett, discussed her situation with other attorneys, the Attorney General for the State of Texas, the County Judge of the county of her residence, and several officials of the U. S. Government in Washington, including a government attorney referred to your petitioner by the office of the secretary to President Eisenhower.

About January 25, 1957, your petitioner received a letter dated January 22, 1957, from the Clerk of this Honorable Court advising her of her right to file a petition for rehearing out of time, supported by memorandum explaining the circumstances for such delay.

Your petitioner says that she has been diligent since her attorneys so strongly advised her against filing a petition for rehearing within the allotted time, and that she has worked continuously since such time in an effort to ascertain her further rights. That your petitioners are very desirous of filing such petition for rehearing, and say that it is not for delay, but in their opinion, is very meritorious and they are confident it will be given full consideration by this Honorable Court.

WHEREFORE, PREMISES CONSIDERED, your petitioners humbly pray that this Honorable Court will grant to them leave to file out of time petition for rehearing of the petition for writ of certiorari heretofore overruled by this Honorable Court.

_____

Irene Smith Cliett

_____

J. M. Cliett

Petitioners

Petition for Rehearing

Subject to favorable action by this Honorable Court on the foregoing motion for leave to file out of time petition for rehearing, your petitioners submit the following petition for rehearing on their original petition for writ of certiorari to review the judgment of the U. S. Court of Appeals, Fifth Circuit at New Orleans, in the above cause which affirmed the judgment of the U. S. District Court for the Southern District of Texas, at Houston.

The attention of this Honorable Court is respectfully invited again to consider the original petition for writ of certiorari which sets out the jurisdiction of this Honorable Court, the questions presented, reasons for granting the writ, and the Federal questions invoked. Your petitioners respectfully submit that grave error was committed by the trial court in not remanding this cause to the District Court of Waller County, Texas, and that grave error was also committed by the Court of Appeals in affirming such action of the trial court. Such errors are pointed out and fully presented in said original petition for writ of certiorari.

Additional Statement of the Case

Your petitioners desire to supplement and add to the statement of the case contained in their original petition for writ of certiorari. In such original statement, reference is made to two opinions of the U. S. Court of Appeals, (*Scott, et al. v. Smith*, 84 Fed. 2d 489, and *Cliett v. Scott, et al.*, 102 Fed. 2d 725). These two opinions resulted from two appeals from the U. S. District Court for the Southern District of Texas, at Houston, between the same parties and concerning the same 700 acres of land.

Petitioners desire to briefly relate the background of said original suit between the surviving wife and heirs at law of George Scott, deceased, and your petitioner, Irene Smith (subsequently Irene Smith Cliett).

About 1919, George Scott, who was relatively a wealthy landowner and farmer in the State of Arkansas, left his wife and children and came to Waller, Texas. He brought no money nor other property with him (except the proceeds of the sale of about 10 bales of cotton, which was less than $500.00), but left everything in Arkansas for the use of his wife and children. He was in his late fifties, and in very bad health, and unable to perform any manual labor. Your petitioner, Irene Smith (Cliett), took care of him, furnishing him food and lodging in her home, and treated him as a member of her family. (Her minor son and two of her brothers lived with her.) In return, George Scott later assisted her in the operation of a small store and advised and counseled with her in the purchase of the lands in controversy. However, he paid no part of the consideration for said lands.

The first tract of land that was purchased was a 50-acre tract on which your petitioner, her family and George Scott lived, and on which they operated a small country store. This tract of land was taken in the name of George Scott. All of the remaining 700 acres of land, which constituted several purchases, were bought and paid for by Irene Smith (Cliett), and taken in her name. The purchases of the 700 acres were made within from two to five years prior to the death of George Scott in 1933.

About one year after George Scott's death, your petitioner brought suit against the surviving wife and heirs at law of George Scott in the District Court of Waller County,

Texas, for the title to and possession of said 50 acres of land, which stood in the name of George Scott. This case was tried in Waller County, and resulted in a favorable verdict of a jury, and a favorable judgment based thereon to your petitioner. Such case was appealed, and the judgment of the trial court awarding said property to your petitioner was sustained and affirmed.

The surviving wife and heirs at law of George Scott, deceased, brought suit in the U. S. District Court at Houston, for the title to and possession of the 700 acres of land that stood in the name of your petitioner. Upon the first trial of this case, the Honorable T. M. Kennerly, District Judge, refused the plaintiffs any relief, holding that your petitioner owned said land. Upon appeal, the case was reversed with instructions for further development as to the respective interests of Irene Smith and George Scott in said 700 acres of land. (See opinion attached hereto, *Scott, et al. v. Smith*, 84 Fed. 2d 489.)

When said case was subsequently set for trial in the District Court in Houston, it was not tried before Judge Kennerly, but before Judge Robert T. Ervin, a visiting judge (Judge Kennerly was then the only U. S. District Judge serving in the Southern District of Texas, at Houston).

Your petitioner received a wire on a given Saturday from her attorneys, Sewell, Taylor, Morris & Garwood, of Houston, Texas, acting through Larry Morris, that the case would be called for trial on the following Monday, and to bring in her witnesses. Your petitioner further says that on the following Monday morning, she had 25 witnesses in the courtroom to testify, and that over her strenuous objections, her attorneys refused to put on any testimony, although the Court of Appeals had been very definite in its opinion in requiring additional proof.

The identical same record of the first trial was introduced in evidence in the second trial, and it is obvious that Judge Ervin had no alternative except to award one-half of the property to plaintiffs in view of the instructions contained in the opinion of the Court of Appeals. Notwithstanding petitioner's most strenuous objections and notwithstanding the fact that petitioner had 25 witnesses to testify as to her individual purchases of said properties, including the men from whom she had purchased said properties, her attorneys steadfastly refused to put on this testimony, telling her that the burden was on the plaintiffs and advising her to appeal. An appeal was taken, and the Court of Appeals, of necessity, affirmed the case, since no additional evidence was introduced as directed in their first opinion. (See Second Opinion attached hereto, *Cliett, et al. v. Scott, et al.*, 102 Fed. 2d 725.)

Petitioners are attaching hereto as Appendix II two affidavits in support of the foregoing supplemental statement. These affidavits are by persons who were present to testify at the second trial.

Additional Question Presented

In the petition for writ of certiorari, only two questions were presented, both of which challenged the correctness of the judgment of the Court of Appeals in affirming the action of the trial court in overruling petitioners' motion to remand this case from the U. S. District Court at Houston to the State Court (being the District Court of Waller County, Texas). Petitioners, in their motion for rehearing, filed in the Court of Appeals urged as one of their grounds therefor, that said court erred in overruling and in refusing to sustain petitioners' third point of error, reading as follows:

> "The trial court erred in rendering a summary judgment in favor of the defendants and against the plaintiffs on plaintiffs' count in trespass to try title to the land in controversy because the pleadings of the parties raised issues of fact that could only be determined upon trial of this cause".

The Court of Appeals in its opinion sustained the action of the trial court in entering a summary judgment in favor of the respondents on petitioners' count in trespass to try title to the 700 acres of land in controversy on the ground that by filing this suit on March 7, 1941, the ten year statute of limitation was tolled for the reason that in filing such suit, petitioners recognized the respondents to be owners of one-half of the land. (Opinion of Court of Appeals is attached as Appendix I to petition for writ of certiorari.)

The filing of plaintiffs' original petition on March 7, 1941 did not toll the statute of limitations. It was not a suit to recover "the estate". It was only in the nature of a petition for a declaratory judgment as to the legal effect of the judgment in equity Cause No. 639 in the U. S. District Court at Houston, which was affirmed by the U. S. Court of Appeals. *(Cliett v. Scott,* 102 F. 2d 725) as to advances made by the plaintiff, Irene Smith Cliett, on the purchase price of properties, taxes, etc. prior to the judgment in said equity Cause No. 639 in March, 1938. At the same time, she alleged unqualifiedly that she was then claiming and had been claiming the properties adversely to the defendants since she purchased them (S.F. 29-32).

Statement

On March 7, 1941, petitioners filed this suit in the District Court of Waller County, Texas (S.F. 26-38). In this petition, petitioners, among other things, alleged:

"That when the deeds to the above described properties were executed and delivered to the plaintiff, Irene Smith Cliett, she went into possession of each and all of said parcels of property, and remained in open and notorious and adverse possession as owner to the date of filing the petition herein." (S.F. 29-30)

"This plaintiff would further show to the court that each and all of the above improvements, repairs and buildings placed on the above described parcels of property as above set forth were done and placed thereon by the plaintiff while she was in peacable, open and notorious possession of all the said parcels of property, owning all the same, and believing that she had acquired a good and valid title thereto and said repairs and improvements were necessary for the use and benefit and protection of said property and those that are owners thereof . . . (S.F. 31-32)

Petitioners only ask for relief against respondents in this suit as originally filed in the event, and only in the event, that it should develop on the trial of the case that any of the defendants owned any right, title or interest or any claim on any of the property described in said petition (S.F. 33-34).

On September 29, 1947, over six years after this suit was filed, respondents voluntarily and without having been served with process, filed their answer and cross-action in the District Court of Waller County, Texas. *In this answer and cross-action, the respondents make a judicial admission that they knew that the plaintiff, Irene Smith Cliett, had been in possession of said land in controversy since January 23, 1933 under a claim hostile to the ownership of the respondents, and that the respondents had been excluded from the possession and occupancy thereof* (S.F. 52). After making such allegation, with full knowl-

edge that petitioners were claiming said property adversely to them, and had so alleged such claim in their petition filed herein, and had been making such claim since the land was purchased by Irene Smith Cliett, respondents do not ask for an adjudication of title and in no way seek to recover one-half of "the ~~statute~~ STATE".

On March 24, 1951, plaintiffs filed their amended pleadings in the District Court of Waller County, Texas, adding for the first time a count in trespass to try title to the 700 acres of land. The defendants filed a motion for summary judgment on December 5, 1951 (S.F. 106)

On February 19, 1952, the trial court wrote a memorandum opinion sustaining said motion for summary judgment only as to plaintiffs' count in trespass to try title, which left for further determination by the court an accounting between plaintiffs and defendants as co-tenants from March 14, 1938 to the date of final trial and judgment (S.F. 156-171).

Summary judgment was entered in accordance with said opinion on March 27, 1952, to which action of the court the petitioners duly excepted (S.F. 171-174).

The precise question before this Honorable Court is whether or not the filing of this suit on March 7, 1941 tolled the running of the 10 year statute of limitation. If it did not, petitioners are entitled to have their case reversed and remanded to the trial court for a full presentation of ~~this~~ their evidence on its claim of title under the 10 year statute of limitation. Unquestionably, plaintiffs' petition and the answer of the respondents raised factual issues which require a trial on the merits to be determined.

Under the applicable statutes of the State of Texas, and under the applicable Texas decisions, the 10 year statute

of limitation is only tolled by a suit for the recovery of "the estate". This suit as originally filed was not for the recovery of an estate. Not until petitioners filed their amended petition in March, 1951 did they seek to recover "the estate".

Authorities

Article 5539b of the Revised Civil Statutes of the State of Texas;
Article 5510, 5514 and 5515 of the Revised Civil Statutes of the State of Texas;
Gibbs, et al. v. Lester, et al., Tex. Com. App., 41 S.W. 2d 28;
Power v. Jones, 135 S.W. 2d 1055;
Dearing, et al. v. Lawrence, et al., 156 S.W. 2d, 1019 at pg. 1021 (Writ of Err. refused);
Callihan v. Fort Worth Well Machinery & Supply Co., 88 S.W. 2d 1057 (Writ of Error dismissed);
Ranger, et al. v. Gholson, et al., 141 S.W. 2d 396 (Writ of Err. dismissed, correct judgment);
Farmers & Merchants National Bank v. Arrington, et ux, 98 S.W. 2d 378;
Universal Life & Accident Co. v. Johnson, 120 S.W. 2d 314 (Writ of Error dismissed);
Hopper, et al. v. Hargrove, et al., 154 S.W. 2d 978 at pg. 981 (Writ of Err. refused).

Petitioners are attaching hereto as Appendix III the above Articles from the Revised Civil Statutes of the State of Texas.

In the case of *Gibbs, et al. v. Lester, et al*, the court said:

> "In order to stop the running of the statute of limitation, and interrupt the peaceable and adverse possession mentioned in the statute, the suit not only must be

> to recover 'the estate', but it must be an adverse suit. That is to say, a suit by someone claiming adversely to the person who, being in possession of the property, is *claiming a title under the statute of limitations.* Such a suit, as is mentioned in Article 5514, must not only be 'adverse' to the parties claiming the title under the statutes of limitation, that is, conflicting antagonistic and hostile, to such person, but such suit must be duly prosecuted to final judgment."

In the case of *Dearing, et al. v. Lawrence, et al.*, suit was filed by plaintiffs in trespass to try title to certain lands on December 11, 1937. On July 15, 1939, the plaintiffs, by their first amended petition, sought to recover one-eighth of the market price of 200,000 barrels of hot oil that was allegedly run from a well on the property.

The court held in its opinion that the suit in trespass to try title and for damages did not toll the running of the statute of limitation for one-eighth of the 200,000 barrels of hot oil; that they were two entirely different transactions.

In the case of *Ranger, et al. v. Gholson, et al.*, the City of Ranger filed suit upon certain paving certificates and then later amended and set up a mechanic's lien contract, signed only by the husband, for the cost of the paving. The court held that the suit upon the paving certificates did not toll the statutes of limitation which ran against the written contract or mechanic's lien, which was given for the cost of the paving. The court said:

> "(8) Article 5539b, Vernon's Ann. Civ. St., does not benefit the appellants. The cause of action, evidenced by the paving assessment to which the plea of two years limitation applies, grows out of a 'distinct or different transaction and occurrence' from that evi-

denced by the written contract or mechanic's lien of date March 8, 1928 (set up in 'amended plea in intervention' for the first time, September 20, 1937" to which cause of action four years' limitation applies."

The case of *Farmers & Merchants National Bank v. Arrington, et ux*, was a suit filed by the bank against one Mrs. Lucille Webb and Charley Arrington, et ux, upon certain notes and for foreclosure of deed of trust lien on certain property. In the original petition, the only allegation concerning the Arrington was that they were claiming and asserting an interest in a portion of the property, but that such claim was inferior to that of the plaintiffs. Later, plaintiff filed its first amended petition, reasserting its claim against Mrs. Webb, and in addition thereto, suing the Arringtons on two vendor's lien notes that they had executed, and asking for foreclosure. The Court held that the cause of action stated in the original petition did not toll the running of the statute of limitation on the vendor's lien notes owing by the Arringtons. In its opinion, the court said:

"There can be no doubt, we think, that it was barred by limitation, unless Vernon's Ann. Civ. St., Art. 5539b, operated under the circumstances to save it from such consequences. The statute mentioned within its scope of operation undoubtedly wrought important changes in the previously existing laws of limitation. Under its provision a suit asserting a cause of action not barred may toll the running of limitation against another and entirely different cause of action. There is this exception, however; *the suit upon the original cause of action will not toll the running of limitation against another and different cause of action if the latter grows out of a wholly new, distinct or different transaction and occurrence.*"

> "(10) The question then is this: Does the cause of action upon the Arrington notes and for foreclosure of the vendor's lien and deed of trust lien grow out of a transaction and/or occurrence wholly new, distinct, or different from the transaction and/or occurrence out of which the cause of action originally asserted grew? We think it clearly apparent that they were entirely distinct, one from the other, and within the execption provided by the statute." (Citing cases) (Italics ours)

Under the foregoing authorities, it is clear that the filing of this suit on March 7, 1941 did not toll the running of the ten year statute of limitation in favor of Petitioners because:

1. Such suit was not brought originally for the recovery of "the estate".
2. This suit as originally filed was based upon and grew out of entirely distinct and different transactions and occurrences than the claim of petitioners in trespass to try title under the ten year statute of limitation which for the first time was urged in March, 1951.
3. The claim urged in the original petition and the suit for "the estate" included in petitioners' first amended petition had no connection with or relation to each other.

We earnestly submit that the Honorable Court of Appeals erred in holding, as a matter of law, that petitioners' claim of adverse possession, use and occupancy under the ten year statute of limitation was interrupted by the filing of this suit, and because of such error, this case should be reversed and remanded.

Conclusion

Your petitioners respectfully submit that the rehearing herein prayed for should be granted in order to achieve justice, and to enable them to have this case heard and determined on the law by this Honorable Court.

Your petitioners were wrongfully denied the privilege of having this case tried in the county of their residence, and such error should be corrected. Without precedent, the trial court held that the filing of the count in trespass to try title by petitioners revived the right of respondents to remove this case to the Federal court notwithstanding the fact that respondents voluntarily and of their own free will had invoked the jurisdiction of the state court as a plaintiff in filing a cross-action for $17,500.00. Under an unbroken line of decisions of this Honorable Court, it had been determined that the privilege of transferring a case to the Federal Court under the federal statutes was solely for a defendant who had been involuntarily and against his will brought into the state court, and not for a plaintiff or a cross-plaintiff who had chosen such form to litigate his claims.

In affirming the judgment of the trial court which overruled petitioners' motion to remand this case to the state court, the United States Court of Appeals decided a federal question which had never been determined by this Honorable Court. Moreover, the exact point of law had never been passed on before by a U. S. Court of Appeals. Petitioners submit that it is most important to the jurisprudence of the United States that this point of law once and for all be determined by this Honorable Court.

Petitioners further submit that the Court of Appeals committed serious error in sustaining the action of the trial court in rendering a summary judgment in favor of respondents on petitioners' count in trespass to try title for the reasons hereinbefore stated. Petitioners have been wrongfully deprived of their constitutional guaranty of their day in court and of a fair and impartial trial by a jury of their peers. This error can only be corrected if this motion be granted.

WHEREFORE, PREMISES CONSIDERED, your petitioners respectfully pray that this motion for rehearing be sustained, and that their petition for writ of certiorari be granted.

Respectfully submitted,

IRENE SMITH CLIETT

J. M. CLIETT
Petitioners

A copy of the foregoing petition for rehearing was mailed to counsel for respondents, W. H. Betts, Hempstead, Texas, on this the 14th day of February, 1957.

IRENE SMITH CLIETT

J. M. CLIETT

APPENDIX I

In the
UNITED STATES CIRCUIT COURT OF APPEALS
for the Fifth Circuit

NO. 7891

Flora Scott, et al., Appellants,
versus
Irene Smith, Appellee

Appeal from the District Court of the United States for the Southern District of Texas.

June 22, 1936

Before FOSTER, SIBLEY and HUTCHESON,
Circuit Judges

SIBLEY, Circuit Judge: The plaintiff-appellants are the heirs at law of George Scott, recently dead intestate, and they sue the defendant-appellee Irene Smith asserting that six tracts of land in Texas to which she had the paper title had been purchased with money of Scott with a resulting trust in his favor. A decree acccordingly, with possession of the land and recovery of rents and revenues and general relief, is prayed. Irene Smith asserts that the lands were

bought with her money and that no one else had any interest in them and she prays that title be quieted in her and for general relief. The trial court found that there was a partnership between George Scott and Irene Smith beginning in 1926 under which they built a store on land standing in the name of George Scott (which land is not here in dispute) and conducted a profitable business until Scott's death in 1933. All money was kept in a deposit account in bank in the name of George Scott, but the checks of Irene Smith against it were also honored. In the absence of definite evidence on the point it is to be assumed that the partners were equally interested. The trial judge, who heard all the witnesses orally including Irene Smith, thus rejected her claim and testimony that everything was hers, but found there was as stated a partnership with Scott. The evidence well sustains these findings. The judge further found that there were individual dealings of each in cattle which were not partnership matters, though the money to buy the cattle was all taken from the partnership bank account and the proceeds of cattle sold put back into that account. We think the evidence does not justify the conclusion that the cattle dealings were not also under the partnership, though transactions of purchase and sale occurred with one when the other was not present. All the cattle seem to have been branded alike with the letter S, which might stand for either Scott or Smith or both. All were pastured on the same land, that in dispute, and when sold the money got for all went went back into the common account whence the purchase price had been taken. It appears to us that these activities also were partnership transactions and do not show any division of partnership profits or attempt thereat. The judge also found that the five tracts of land in dispute bought

respectively in 1927, 1928, 1929, 1930, 1931 and 1932 were not partnership transactions but investments of the separate moneys of Irene Smith and therefore hers without any interest in or trust for Scott. This conclusion we find to be without support in the evidence. There is no doubt that every payment was made with money from the bank account standing in Scott's name, but really belonging to them both as partners. Sometimes Scott made the trades, drew the checks, delivered them, and attended to the taking of the deeds and sometimes Irene Smith did. The papers were taken in her name and she signed the notes when any were given, but all the money that was paid was partnership money. Scott was an aging man nearing seventy and not in good health. He was separated from his wife. Irene Smith was much younger and in good health. He gave as the reason for having one tract put in her name that it would facilitate its transfer if he sold. He would not have to get his wife to join in a conveyance. At other times he said Irene Smith had worked hard and ought to have it. But neither pleading nor evidence is attempted of any gift from him; and in that case his wife's community rights would be in the way. There is no evidence that Scott had withdrawn in any way his share of the partnership moneys, and that what was put into the lands was Irene Smith's share. He and she and her young son all lived together as one household evidently all supported from the store. Scott is not shown to have had any sort of settlement of the partnership with Irene Smith. The bank's record of the entire account is in existence and in evidence and Irene Smith says she has many of the checks, but no effort is made to show any withdrawal by Scott for his own use. We could readily believe that Scott intended that Irene Smith should have the property in case of his

death and not his abandoned family; but we do not think that in case of her death he intended that this Smith child should have everything and he in his old age nothing. But speculation as to intent aside, the fact is that partnership monies have been laid out in lands in the name of one partner with no claim of a gift, and with no offsetting withdrawal by the other partner shown. We think equity can do no other than treat the partner who holds title as a trustee for the partnership. It does appear that on the death of Scott that Irene Smith was not allowed to draw further at the bank and she qualified as Scott's administratrix to get the balance of about $300. Probably she has applied that, or must apply it, as belonging to Scott; so that she may be entitled to an offsetting credit. It is also to be noted that the last purchased tract is heavily incumbered and the partnership equity in it is relatively small. There is no evidence as to the amount or disposition of the stock of merchandise in the store at Scott's death or the indebtedness of the business if any. The decree rendered in favor of Irene Smith cannot stand, nor on the present record should there be one for the plaintiffs. The lands are partnership assets, and the Court ought first to ascertain and settle the affairs of the partnership. To this end the personal representative of George Scott should be made a party. The case should be reopened for further evidence as to the withdrawals of the partners, the debts, and the assets of the partnership besides the lands here in controversy. The proper disposition of the lands may thereby become more evident.

Accordingly the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

In the
UNITED STATES CIRCUIT COURT OF APPEALS
for the Fifth Circuit

No. 8835

Irene Smith Cliett, et al., Appellants
versus
Flora Scott, et al., Appellees

Appeal from the District Court of the United States for the Southern District of Texas.

(March 14, 1939)

Before SIBLEY, HOLMES and McCORD,
Circuit Judges.

McCORD, Circuit Judge: This action was originally instituted by Flora Scott and others, appellees, as heirs of George Scott, deceased, to recover certain lands in Waller County, Texas. The record title to said property was in Irene Smith, now Irene Smith Cliett, and the appellees contended that the lands had been purchased with the money of George Scott.

When this case was here before, *(Scott v. Smith,* 84 F. (2d) 489) we sustained the finding of the trial court that

a partnership existed between Irene Smith (now Irene Smith Cliett) and George Scott and held that in the absence of definite evidence on the point "it is to be assumed that the partners were equally interested".

In that case we said, "The lands are partnership assets, and the court ought first to ascertain and settle the affairs of the partnership. * * * The case should be reopened for further evidence as to the withdrawals of the partners, the debts, and the assets of the partnership besides the lands here in controversy. The proper disposition of the lands may thereby become more evident".

On the second trial of this case in the court below both parties declined to introduce additional evidence, and the cause was submitted for decision on the record made on the former trial. The court thereupon found the issues in favor of the appellees and awarded them one half of the lands in controversy.

Irene Smith Cliett was the surviving partner and the record shows that all information with reference to partnership assets and accounts were peculiarly within her knowledge. Being the surviving partner, the burden was upon her to make an accounting and show thereby, if she could, that her interest in the lands was greater than that presumed by law and declared in our former opinion. This she failed to do.

The decision of the trial court is in conformity with our former opinion.

The judgment is affirmed.

APPENDIX II

AFFIDAVIT OF OWNERSHIP

STATE OF TEXAS §
COUNTY OF WALLER §

BEFORE ME, the undersigned authority on this day personally appeared BENJAMIN HARRISON MEHRKAM, a male citizen of Waller, Harris County, Texas, known to me to be a credible person who after being by me duly sworn stated on his oath that he is sixty-eight (68) years of age, has been a resident of Waller, Harris County, Texas since the year 1911, living continuously at a point situated approximately two and one-half (2½) miles generally south of the home and place of business of Irene Smith Cliett. That in the year 1920, A. D., Irene Smith Cliett at that time Irene Smith and son located in the Joseph Community in Waller County, Texas where she purchased a fifty (50) acre tract of land in the William Heddy Survey, Abstract No. 134 on which she established her home and where she engaged in the dairy and chicken business.

In the year 1926, Mrs. Cliett established on the above fifty (50) acres tract a small business engaging in the buying of dairy products and poultry raised in the community, out of which enterprise there later grew and developed what became locally known as Smith's Value Store, a general merchandise store, which business was to my knowledge owned and operated by Mrs. Irene Smith Cliett and in which store a man by the name of George Scott, another resident of the Joseph Community, became a frequent visitor and on occasions, a voluntary helper.

Through the period 1920, 1926, and thereafter for many years, I also frequented and traded at Mrs. Cliett's store and on many occasions engaged Mr. George Scott in conversation, particularly as to why he located in the community, not having any visible means of support and what, if any, interest he had in the foregoing mercantile establishment. More than once, Mr. Scott told me that he was there because of poor health, which was very evident, and that he had no interest in the store; that he was not associated with the then Mrs. Smith in any sort of business undertaking or partnership and, that he was helping around the store in consideration for some place to stay and for someone to care for him in his illness, which Mrs. Smith was then doing and continued to do until the time of his death in 1933. Mr. Scott told me that he was a victim of heart trouble and that except for the care given him by Mrs. Smith, he would not be living. On one occasion, I went to the store and found Mr. Scott there alone, ill and lying down on a counter. When he revived, he told me that he didn't have anything and when he died he didn't want the people in the community to spend any money on his burial; that he wanted them to jury bury him over "in that corner" pointing to a location under a big oak tree near the store.

Earlier and in the 1930's, I had approached Mr. Scott about a loan of some money and his response was to tell me that he had no money to loan me, that the store and everything belonged to Mrs. Smith and that I might speak to her when she came back off of her produce route.

It is my understanding that some of the heirs of Mr. George Scott claims some interest in land in Waller County that is in the name of Irene Smith and for which suit was brought in the Federal District Court. Upon the rendition

of the decision of the United States Circuit Court of Appeals for the Fifth Circuit, in Cause No. 7891, June 22, 1936, along with some twenty-five (25) other people, I was subpoenaed as a witness in a new trial to be held in accordance with decision of the Court of Appeals in said cause, but through the action of attorneys for Irene Smith Cliett, neither I nor any of the other witnesses were permitted to testify as to our knowledge with respect to the ownership to the property in question and as to the existence of any partnership arrangements between Irene Smith Cliett and George Scott, at which time I heard an attorney for Mrs. Irene Smith Cliett tell her that there was no use in offering any testimony, that the judge of the court had already made up his mind that a partnership existed and he intended to divide the property without the introduction of any additional testimony. I heard Mrs. Cliett protest this sort of action to the attorney, but without avail and this affidavit is made of my own free will without duress or hope of reward to the end as considering the uncertainty of life, what I have stated herein will serve to establish the facts in the case that there was no partnership arrangement between George Scott and Irene Smith Cliett in any sort of commercial undertaking in the Joseph Community and that justice may be done.

BENJAMIN HARRISON MEHRKAM

Benjamin Harrison Mehrkam

SWORN AND SUBSCRIBED to before me this 31st day of August, A. D. 1956.

JOHN C WINFREE
John C. Winfree, Notary Public in and for Waller County, Texas.

(Seal)

ACKNOWLEDGMENT

STATE OF TEXAS §
COUNTY OF WALLER §

BEFORE ME, the undersigned authority, in and for said county and State, on this day personally appeared BENJAMIN HARRISON MEHRKAM, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this 31st day of August, A. D. 1956.

JOHN C. WINFREE
John C. Winfree, Notary Public in and for Waller County, Texas.

THE STATE OF TEXAS
COUNTY OF WALLER:

I, DICK CUNY, Clerk of the County Court in and for Waller County, Texas, do hereby certify that the foregoing instrument of writing, dated the 31 day of Aug. 1956 with its certificate of authentication, was filed in my office on the 28 day of Nov. 1956, at 3:15 o'clock P. M. and duly recorded the 6 day of Dec. 1956, at 9:20 o'clock A. M., in the Deed Records of said County in Volume 147, Page 197.

Given under my hand and seal of the County Court of said County at office in Hempstead, Texas, the day and year last above written.

DICK CUNY
County Clerk, Waller County, Texas

By_____
Deputy

AFFIDAVIT

THE STATE OF TEXAS §

COUNTY OF WALLER §

Before me the undersigned authority on this day personally appeared Lawrence H. Glass, known to me to be a credible person, who first being sworn to me on his oath, made the following statement:

My name is Lawrence H. Glass; I am 66 years of age, and have lived in Waller County, Texas all of my life. I have been personally and well acquainted with Mrs. Irene Smith (now Mrs. Irene Smith Cliett) for thirty-five years. I was also well and personally acquainted with Mr. George Scott during all of the time that he lived in Waller County, Texas until his death on Saturday night, January 21, 1933. Upon Mr. Scott's sudden death on that cold, rainy night and being notified of it by Edward, Mrs. Smith's son, I went immediately to her residence. Earlier in the evening, I had seen Mr. Scott at church and he told me that he was feeling very badly and his death came as no surprise to me, he being a very weakly, sick, and nervous man. There was something wrong with his right hand and arm and he could not use his hand to write without supporting his hand on something. He told me that he had been to doctors for treatment several times before he came to Waller County and they all told him that they could not do him any good. On a number of occasions he told me that he knew that Mrs. Irene Smith was a pretty good nurse, that he had known her and her family all her life and she was going to take care of and help him to live. I do know that she worked and made a living for him and cared for him until he died.

When I first knew Mrs. Smith she lived on a 50 acre tract of land that she purchased about the year 1920 and she made her living farming, dairying, and raising of poultry and livestock. After living there for about six years, she built a very small store-building on the land and began buying all items of farm produce, such as eggs, poultry, and dairy products. Also, when cattle would die in the winter, the owner skinned the dead cattle and would sell the hides to Mrs. Smith. She also bought furs. I am one of the large number of people who traded with Mrs. Smith in her country store and she had a nice business because she paid everyone better prices for everything that we had to sell than we could sell it for elsewhere and in turn we purchased our feed, groceries, gasoline and other items that we needed from her. When she first started in business all she had in the store was a sack of potatoes and a basket of apples but as her business grew, she added to her store-stock everything we needed including dry goods, shoes, hardware, and harness and when she didn't have what we wanted, she got it for us in a day or two because for many years she did all of her hauling herself from Houston, Texas to her store two or three times a week, a roundtrip distance of 125 miles over bad roads. In addition to the operation of her business, she raised cattle, milked 8 to 10 cows each day before daylight and after dark and in all this work, there was no one to help her, her son Edward being a very small boy. She sold lots of cream, milk, butter, picked berries in season and everything that they had to live on before she built the store. By they, I mean, Mr. Scott, herself and little boy. On very busy days, such as Saturday and shipping days, she would ask me to help her with the grist mill she had come to operate in back of the store to grind all of our corn for us. She made our meal for bread and corn chops for

our stock and poultry from this mill. In time, she put in a filling station where we got our gas and oil; also kerosene for our light for we had no electricity at that time. I had all my dealings with Mrs. Smith, I always settled with her. She would pay me the money or take my pay out in groceries or whatever I needed for my family. There were lots of rabbits in the country in those years and many people would trap them and dress them and sell them to Mrs. Smith and she sold them to markets in Houston. I am keeping a .22 rifle that my little boys bought with the money they got for the rabbits they sold to Mrs. Smith. They are all grown now and gone and the gun is a souvenir. I wouldn't sell it for any price.

I very often talked to Mr. George Scott about his life. He talked about what he used to do and very often talked about his family. He said he had lots of property, land, and money back in Arkansas and Oklahoma. I asked him why he was living "here" like "this" without any money and he said he could not get along any more with his people, that they wanted to spend too much money and that it was just a fuss all the time so he left them and let them have everything he had. Mr. Scott had spells and was very ill and I asked him if he wanted me to get in touch with his people and he told me that he did not want his people around him, that they made life miserable for him, that they wouldn't do anything for him when he was sick and he did not want them around when he died. I asked him about the land he was making trades for in the late 1920's and early 1930's and he told me he was not buying any land for himself, that he was just helping Mrs. Smith out with the trades for what she did for him. That she was actually buying the land with her own money, the money that he used being hers. That he did not want to be bothered with anything, just wanted to live in peace.

About the year after Mr. Scott's death, a daughter, Mrs. Mamie Hammonds found me in the town of Waller, Texas, which is about 9 miles from Mrs. Smith's store and said she wanted to talk to me about her father. The only interest she showed was about Mrs. Smith's property. She was in a fine car and asked me to get in the car and talk to her and some man that was in the car with her, writing down what I had to say. I told her the facts as I have stated them in this affidavit and she said that would not do her any good and she asked the man in the back seat if she could use my statements and he told her he did not think so. Then she asked me if I would change my statement for good pay, saying that "I have got dollars where Mrs. Smith hasn't got pennies". I told her I would not change my statement for love nor money.

I am one of around 25 people that went to Houston, Texas to offer testimony for Mrs. Smith on occasion of a second trial in Federal District Court in Houston before Judge Irwin. But, along with the others, I was not allowed on the witness stand. Mr. Larry Morris acting as Mrs. Smith's lawyer and a member of the firm, Sewell, Taylor, Morris & Garwood of Houston, Texas told me that he was not going to let anyone testify because it was no use, that the Judge had already made up his mind to give the Scott's one-half the property.

The foregoing statements are made of my own free will without duress or hope of reward to the end that considering the uncertainty of life that what I have stated herein will serve to establish the facts in the case that there was no partnership arrangement between George Scott and Irene Smith Cliett in any sort of commercial under-

taking in the community in which they lived in Waller County, Texas and that justice may be done.

LAWRENCE H. GLASS
Lawrence H. Glass

Sworn to and subscribed before me the undersigned authority on this the 30th day of November, A. D. 1956.

JOHN C. WINFREE

(SEAL)

Notary Public in and for
Waller County, Texas

THE STATE OF TEXAS §
COUNTY OF WALLER §

Before me, the undersigned authority, on this day personally appeared Lawrence H. Glass, known to me to be ther person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same, for the purposes and consideration therein expressed.

Given under my hand and seal of office, this 30th day of November, A. D. 1956.

JOHN C. WINFREE
Notary Public in and for
Waller County, Texas

(SEAL)

Filed for Record at 11:30 o'clock A. M., January 3, 1957.

Dick Cuny, County Clerk, Waller County, Texas
By Leola Hancock, Deputy

THE STATE OF TEXAS §
COUNTY OF WALLER §

I, Dick Cuny, Clerk of the County Court of Waller County, Texas, do hereby certify that the above and foregoing is a true and correct copy of an AFFIDAVIT from Lawrence H. Glass to Mrs. Irene Smith (now Mrs. Irene Smith Cliett) as the same appears from the original instrument on file in this office under File No. 36,634.

GIVEN UNDER MY HAND AND SEAL OF SAID COURT at office in Hempstead, Texas, this the 3rd day of January, A. D., 1957.

DICK CUNY, Clerk of the County Court
Waller County, Texas
By Leola Hancock, Deputy

APPENDIX III

Quotations from the Revised Civil Statutes of the State of Texas

Art. 5510. 5676, 3343 Ten years' possession.

Any person who has the right of action for the recovery of lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward. The peaceable and adverse possession contemplated in this article, as against the person having right of action, shall be construed to embrace not more than one hundred and sixty acres, including the improvements or the number of acres actually enclosed, should the same exceed one hundred and sixty acres; but when such possession is taken and held under some written

memorandum of title, other than a deed, which fixes the boundaries of the possessor's claim and is duly registered, such peaceable possession shall be construed to be co-extensive with the boundaries specified in such instrument. Id.; P. D. 4621-24.

Art. 5514. 5680, 3348, 3197 "Peaceable possession".

"Peaceable possession" is such as is continuous and not interrupted by adverse suit to recover the estate. Acts 1841, p. 163; P. D. 4621; G. L. vol. 2, p. 627.

Art. 5515. 5681, 3349, 3198 "Adverse possession".

"Adverse possession" is an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another.

Art. 5539b. Limitations as affecting amended and supplemental pleading.

Whenever any pleading is filed by any party to a suit embracing any cause of action, cross-action, counter-claim, or defense, and at the time of filing such pleading such cause of action, cross-action, counterclaim, or defense is not subject to a plea of limitation, no subsequent amendment or supplement changing any of the facts or grounds of liability or of defense shall be subject to a plea of limitation, provided such amendment or supplement is not wholly based upon and grows out of a new, distinct or different transaction and occurrence. Provided, however, when any such amendment or supplement is filed, if any new or different facts are alleged, upon application of the opposite party, the court may postpone or continue the case as justice may require. Acts 1931, 42nd Leg., p. 194, ch. 115, § 1.

In The

SUPREME COURT OF THE UNITED STATES

No. 439

Irene Smith Cliett, et vir, Petitioners

V.

Jeff Scott, et al., Respondents

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Irene Smith Cliett, ~~respectfully~~ humbly prays that I may be allowed the priviledge of adding this preface to my original petition, filed with the honorable court February 18, 1957. I was advised by other lawyers that it would be necessary to have an attorney help me prepare my brief in proper legal form that would be acceptable to the court. I am not satisfied with this brief, in proper legal form. The facts in the case are not brought out clearly.

I call your attention especially to paragraph 2, page 5, "About 1919, George Scott, who was a relatively wealthy landowner and farmer in the State of Arkansas." This is misleading. George Scott, due to a business envolvement, had long prior to this time signed all his assets to his wife and sons and had no recourse to any monies, except as

granted by his wife and sons. This recourse was repeatedly denied.

Furthermore, the statement, "left his wife and children", is also misleading. They were not children, but grown and married men and women. George Scott had been a grandfather many years.

My father moved his family to George Scott's farm when we children were from two to twelve years old. In the succeeding years before my father's death he and George Scott developed a clos personal friendship. He became very close to all my family. At my father's death in 1917, he made all funeral arrangement. A few weeks later he brought a doctor for my mother when she would have died without his friendly intervention. What more can I say about why he lived with me and my small son, when I too after an unfortunate marriage was left alone in the world and why I proudly cared for him in his old age?

I lived on this fifty acres farm of mine for more than six years before I borrowed a small sum of money from my brother, Lloyd Mayberry, and built a small trading post. I bought cream, poultry, eggs and other farm products from farmers in this community. Out of this small beginning, by very hard manuel labor and denying myself and son everything except the bare necessities, I was able to gradually build a good general merchandise store and buy this land. This store, started in 1926, was a good business until it was destroyed thirty years later by a mysterious and unexplained fire during the night of February 3, 1956. Being so far out in the country and without any fire protection I could never obtain fire insurance.

The United States Circuit Court of Appeals, Appendix I, page 18, line 8, was wrong in their opinion of the bank account that stood in George Scott's name. Mr. Scott was an old friend from my childhood, who at the start of my business career gave me [redacted] advice. He had full-advantage of me, and had he cared to take it, could have used the account for his personal interest at any time. The court's assumption that the business was a partnership borders on the ridiculous. Mr. Scott was physically unable to contribute anything to the success of the business. He was my teacher not my partner. Even the duties he performed the two days a week when he stayed ir the store while I was in Houston was, after his death, taken over by a neighborhood girl for one dollar per day. There was very little business unless I was there to barter the supplies for the produce. I obtained my money when the produce was sold. I, and I alone, drove the truck. Had I hired a man to do this heavy work thru the years there would have been no money to purchase this land. I drove the truck, sold the produce, bought wholesale supplies for the store. The very heart of the business and all the money was made by me in the buying and selling that I did in Houston. I conducted business with many, many firms in Houston. None of them in all those years ever heard of George Scott.

The milk that was sold by me was milked by hand, my hands, from fifteen cows at a time at five o'clock in the morning and again after dark when all business had been taken care of.

-4-

In addition to the almost inhuman burden of the business, George Scott was a great care for me, especially in the last few years before his death. His bitterness at the treatment he had received at the hands of his family caused him to make the statement many times that they were not to be notified of his death which occured in 1933 when he was approximately 75 years of age. This was almost twenty-five years ago.

I refer the Honorable court to legal form brief; page 8, from ten years set out. From some technical point of law, the proof I set before the court and the country, is the fact that I have owned this land with recorded land title for over a quarter of a century, and this case has been in court over 22 years. This has bled me white. George Scott's so called heirs have always worked some scheme to keep from coming before the court for the simple reason they cannot prove the judgement that was rendered against me was according to the constitution of the United States of America. The Fifth Amendment reads in part, "No one shall be deprived of life, liberty or property without due process of law."

Respectfully submitted,

Irene Smith Cliett

A copy of the foregoing preface to petition for rehearing was mailed to counsel for respondents, W.H. Betts, Hempstead, Texas, on this the 25th day of February, 1957.

Irene Smith Cliett

30/21

Office-Supreme Court, U.S.
FILED
FEB 23 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 439

IRENE SMITH CLIETT, ET VIR, *Petitioners*

v.

JEFF SCOTT, ET AL., *Respondents*

REPLY OF REED SCOTT, ET AL., REPONDENTS, TO PETITION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

W. H. BETTS
P. O. Box 536
Hempstead, Texas
Attorney for Respondents

ALPHA LAW BRIEF CO., 402 M & M BLDG., HOUSTON 2

IN THE

Supreme Court of the United States

October Term, 1956

No. 439

IRENE SMITH CLIETT, ET VIR, *Petitioners*

v.

JEFF SCOTT, ET AL., *Respondents*

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

REPLY OF REED SCOTT, ET AL., REPONDENTS, TO PETITIONERS' MOTION TO FILE PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

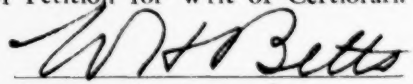
The opinion of the United States Court of Appeals to which the Writ of Certiorari is herein sought was rendered and entered May 15, 1956. The original petition for Writ of Certiorari was filed by the Petitioners herein on September 21, 1956. This Honorable Court denied the original Petition for Writ of Certiorari herein on November 19, 1956. The Respondents are not informed as to when the Petition for Rehearing of Petition for Writ of Certiorari by the Petitioners, per se, may have been deposited or filed with the Clerk of this Court,

but copy thereof was furnished to these Respondents on February 16, 1957.

The Motion of Petitioners to file this Petition for Rehearing after the time for the filing of such a motion has expired shows that Petitioners' counsel admits and advised Petitioners that there were no grounds, basis or reason upon which this petition for late filing of and/or the filing of such Petition for Rehearing could be based, and that the same could be construed as being made for the purpose of delay only, and not within the purview of or justified by the rules of this Honorable Court.

There is no showing whatever of any reason and no reasonable excuse is made for the untimely filing of this petition for leave to file a Motion for Rehearing long after the time prescribed therefor has expired. The only statement of Petitioners or reasons given by them for the filing of this motion for leave to file a belated petition for rehearing was the inability of the Petitioner, Irene Smith Cliett, to reconcile herself to the judgment of the Honorable United States Court of Appeals, Fifth Circuit, rendered March 14, 1939, in Cliett, et vir, v. Scott, et al., 102 F. 2d 725, and her desire to have this Honorable Court, some eighteen years later, review the aforesaid judgment of 1939.

WHEREFORE, Respondents pray the Court to refuse to grant leave to Petitioners to file the subject belated Petition for Rehearing of Petition for Writ of Certiorari.



Attorney for Respondents,
Reed Scott, Mamie S. Hammonds
and Estate of Jeff Scott, deceased.

II.

REPLY OF REED SCOTT, ET AL., REPONDENTS, TO PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

In the event, and only in the event, this Honorable Court should grant Petitioners leave to file their belated Petition for Rehearing of Petition for Writ of Certiorari; Respondents, Reed Scott, Mamie S. Hammonds and the Estate of Jeff Scott, deceased, respectfully request the Court's attention to the following reply to such petition.

Petitioners present no new evidence, fact or circumstance, not well known to them long prior to the filing of their original Petition for Writ of Certiorari herein; and the only "Additional Question Presented" in such Petition for Rehearing relates to the action of the Trial Court in rendering a Summary Judgment upon a count in trespass to try title, and which action was affirmed by the Court of Appeals, and which proposition was considered of such insufficient merit to justify the inclusion thereof in Petitioners' original Petition for Writ of Certiorari herein. Any uncertainty with respect to whether or not the count in trespass to try title and/or the disposition thereof by the District Court or Court of Civil Appeals was inadvertently overlooked by Petitioners at the time of the filing of their original Petition for Writ of Certiorari herein is negatived by their reference thereto in their original Petition for Writ of Certiorari to this Honorable Court, p. 3, II.

Moreover, the "Additional Statement of the Case" and the two affidavits appended to this Petition for Rehearing clearly relate to matters which were determined in the former proceedings therein referred to and were concluded by the long since final judgment of the United

States Court of Appeals, Fifth Circuit, in *Cliett v. Scott*, 102 F. 2d 725, rendered *March 14, 1939*. And may we observe that none of the facts referred to in such "Additional Statement of the Case" were presented to or considered by either the District Court or the Court of Appeals in this case and *constitute no part of the record* in this case in such courts and/or in this Court.

Briefly, the District Court in the instant case, held that the final judgment in the aforesaid Cause of *Cliett v. Scott*, 102 F. 2d 725, vested in these Respondents and Miss Bertha Scott, and their predecessors in title, an undivided one-half interest in and to the subject 700 acres of land as of the date of such judgment (affirmed March 14, 1939); that the Petitioners by their own judicial admissions in pleadings filed in the State Court on March 7, 1941, admitted the interest of these Respondents and their predecessors in title, and sought contribution from them to the expense of the payment of taxes, maintenance and repairs; and, Petitioners were precluded, *as a matter of law*, from asserting herein the acquisition by them of title to such undivided one-half interest in the subject lands as were theretofore decreed to be owned by these Respondents and their said predecessors in title. This was a well considered and learned opinion by the District Court and the part of the memorandum opinion of that Court upon this point (as set out in the Statement of Facts, pp. 156-171) is set out as Appendix I hereof. The law as so pronounced by the District Court on this point was concurred in by the United States Court of Appeals, Fifth Circuit, herein and it was there affirmed. Indeed, it would be presumptive for these Respondents to here attempt to improve upon the presentation of the law of Texas upon this point, as reviewed and announced in the memorandum

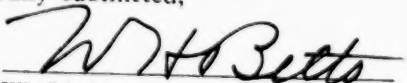
opinion of the District Court in this case and incorporated herein as Appendix I; but the attention of this Court thereto is earnestly solicited.

Indeed, Respondents are unaware of any basis in law or logic which would in anywise support or justify any consideration by this Court in this case of any complaint the Petitioners may have had, if any, of the manner in which their attorney or attorneys represented them in another case in 1938 or 1939; and this notwithstanding that the lands there involved might be the same lands as constitute the subject matter of his case. In any event, if Petitioners have or ever had any grievance, right or cause of action against the able and distinguished counsel, Larry Morris, Esquire, a member of the Bar of this Court, by reason of their representation by him in 1938 or 1939, the same could be in nowise redressed in this case and/or this forum at this time; and there certainly could be no basis for calling upon these Respondents to answer therefor.

Conclusion

The Petition for Rehearing of Petition for Writ of Certiorari, if permitted to be filed herein, should be denied.

Respectfully submitted,



W. H. BETTS
P. O. Box 536
Hempstead, Texas

Attorney for Respondents Reed Scott, Mamie S. Hammonds and the Estate of Jeff Scott, deceased.

A copy of the foregoing Replies have been mailed to Mrs. Irene Smith Cliett and J. M. Cliett, Route, Hockley, Texas, and Messrs, Frank O. Barnes and Sam G. Croom, Attorneys at Law, 619 San Jacinto Building, Houston 2, Texas, on this 25 day of February, A. D. 1957.

W H Betts

Attorney for said Respondents

APPENDIX I

KENNERLY, Chief Judge:

This suit, filed in a State Court March 7, 1941, and removed into this Court April 13, 1951, involves certain lands in Waller County, in this District and Division. The parties to this suit, or those whose title they have, have heretofore been before this Court and an Appellate Court, litigating the title, etc. to such lands. See Scott v. Smith, 84 Fed. (2d) 489, and Cliett v. Scott, 102 Fed. (2d) 725. As a result of that litigation, Plaintiffs and Defendants by Judgment of this Court on March 14, 1938,[1] each recovered an undivided one-half interest in and to such lands.

This suit having been originally filed in the State Court, various pleadings have been filed by the parties both in the State Court and in this Court. These are hereinafter more fully set forth. However, the case is now pending here on Plaintiffs' Third Amended Complaint, filed herein October 15, 1951. In such pleading, Plaintiffs seek to recover title to and possession of said lands in their *entirety*, but in the alter-

[1] The pertinent portion of such Judgment is as follows:

> "That the plaintiffs herein Mrs. Flora Scott, a widow, individually and as the Administratrix of the estate of George Scott, deceased, and Mamie S. Hammonds, O. O. Hammonds, Reed Scott, Jeff Scott and Bertha Scott are the owners and holders of a full undivided one-half interest in and to the following described land and premises situated in Waller County, Texas, to-wit:
>
> (Here follows description of land by metes and bounds) the title to which land stands in the name of Irene Smith, now Irene Smith Cliett.
>
> "That it be and it is here and now declared that the defendant herein Irene Smith Cliett holds the title to said undivided one-half interest in the lands aforesaid in trust for the plaintiffs hereinabove named."

native Plaintiffs say that if Defendants own an undivided one-half interest therein, Plaintiffs have paid certain taxes, costs and expenses with respect thereto, and they sue for, and claim they are entitled to recover from Defendants, reimbursement therefor. Defendants deny that Plaintiffs own the *entire* title to such lands, but say that Plaintiffs and defendants each own an undivided one-half thereof. They also deny that Plaintiffs are entitled to recover the taxes, costs and expenses sued for.

Defendants have moved for Summary Judgment, and this is a hearing of such Motion. The grounds upon which Defendants claim to be entitled to such Summary Judgment will be stated in the discussion.

1: Defendants say in their Motion for Summary Judgment that the Judgment of this Court of March 23, 1938, vested in Plaintiffs and Defendants each an undivided one-half interest in said land, and they plead such Judgment as res adjudicata of any dispute now existing between the parties with respect to such title. It is perfectly plain that under such Judgment and the Record as presented here, Plaintiffs and Defendants are each the owners of an undivided one-half interest in such lands, unless Plaintiffs have, as they claim, acquired title thereto under the Texas Ten Year Statute of Limitation.

2: Plaintiffs, as stated, claim such land, etc. under the Texas Ten Year Statute of Limitation.[2] Defendants say in

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[2] Article 5510 of Vernon's Civil Statutes of Texas is as follows:

"Art. 5510 Ten years' possession.

"Any person who has the right of action for the recovery of lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within

reply that even though Plaintiffs have been in possession of said land (which, however, they deny) for the length of time prescribed by such Statute, Plaintiffs cannot recover under such Statute, because Plaintiffs' claim has been neither peaceable[3] nor adverse[4] within the meaning of such Statute. Or if it has been peaceable or adverse, they say the facts show a tolling of such Statute for a sufficient length of time to prevent Plaintiffs from recovering thereunder.

The Judgment of March 23, 1938, settles, as of that date, all questions of title, limitation, possession, or otherwise, between Plaintiffs and Defendants, and in order to recover, Plaintiffs must show full ten years *peaceable* and *adverse* possession under such Statute *subsequent to that date*. This Record clearly shows that Plaintiffs have not done so and cannot do so.

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ten years next after his cause of action shall have accrued, and not afterward. The peaceable and adverse possession contemplated in this article, as against the person having right of action, shall be construed to embrace not more than one hundred and sixty acres, including the improvements or the number of acres actually enclosed, should the same exceed one hundred and sixty acres; but when such possession is taken and held under some written memorandum of title, other than a deed, which fixes the boundaries of the possessor's claim and is duly registered, such peaceable possession shall be construed to be co-extensive with the boundaries specified in such instrument."

[3] Article 5514, defining peaceable possession, is as follows:

"Art. 5514. 'Peaceable possession'

"'Peaceable possession' is such as is continuous and not **interrupted** by adverse suit to recover the estate."

[4] Article 5515, defining adverse possession, is as follows:

"Art. 5515. 'Adverse possession'

"'Adverse possession' is an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another."

Whatever may be said with respect to Plaintiffs' possession between March 23, 1938, and March 7, 1941, it is perfectly plain that this Record shows that Plaintiffs' claim and possession of said land was not peaceable and adverse for full ten years subsequent to March 7, 1941. Particularly it was not peaceable and adverse from March 7, 1941, to September 29, 1947. Nor from September 29, 1947, to March 24, 1951. This was true for the following reasons:

> (a) On that date (March 7, 1941), not claiming such lands in their entirety, but moving on the theory that Plaintiffs and Defendants each owned an undivided one-half interest therein, Plaintiffs brought this suit against Defendants in the District Court of Waller County to recover from them monies claimed by Plaintiffs to have been expended for taxes, costs and expenses on the *whole* of such lands. They ask that the sum so paid out be declared to be a lien on such lands or Defendants' one-half thereof.[5]

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[5] The Prayer in Plaintiffs' Petition is as follows:

> "Wherefore, premises considered, plaintiff prays the court that the defendants herein be cited to appear and answer herein and that she recover a judgment (a) for the several amounts paid and expended by her for repairs and improvements on said parcels of property above fully described, together with 6% interest per annum thereon from the date of the several payments and that an order be entered herein establishing a lien in favor of plaintiff against said several parcels of property for the costs of said improvements and repairs and (b) that plaintiff have judgment against the defendants and each of them for the several amounts paid by her when the deeds for the several parcels of property above described were obtained, as well as the several balances of the purchase price of said parcels of property thereafter paid by her, together with 6% interest per annum thereon from date of the said several payments and further that it be decreed that she have a lien on said parcels of property for said several amounts and that in any event she be subrogated

(b) On September 29, 1947, Defendants filed in this suit in the District Court of Waller County their Answer to Plaintiffs' suit so filed on March 7, 1941, in which Defendants join issue with Plaintiffs as to Plaintiffs' right to recover such sums of money from Defendants, and by cross action, sue Plaintiffs for the rents and profits of one-half of such lands during the period of time Plaintiffs had been in possession thereof.

(c) On October 17, 1947, by Supplemental Petition filed in said cause in the District Court of Waller County, Plaintiffs join issue with Defendants on Defendants' said Answer and Cross Action, and pray that they be given Judgment against Defendants as set forth in their original Petition filed March 7, 1941.[6]

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to the liens held and owned by the grantors of said property at the time said deeds were executed securing the purchase price of the same and (c) that she have a judgment against the defendants and each of them for the taxes paid by her in the amounts set forth in Exhibits A and B attached hereto and (d) that it be decreed that she have a lien on said parcels of property securing the payment of said several amounts paid as taxes thereon, and in any event that a decree be entered subrogating her to the lien of the State and County against said parcels of property for said taxes so paid by her, all of said liens and any Judgments entered be decreed to be prior to any right, title or interest of the defendants in and to said parcels of property or any of them, and further that plaintiff recover all costs and for such other and further relief, special and general, in law or equity, to which she may be justly entitled."

[6] The Prayer of Plaintiffs in such Supplemental pleading is as follows:

"Wherefore, having answered fully to the defendants' cross-action and all parties being before the Court, plaintiffs pray that the defendants take nothing by their cross-action and that these plaintiffs go hence without day as to said cross-action; that they further recover judgment against the defendants as prayed for in their original petition and for all costs of suit and for general relief."

(d) On March 24, 1951, Plaintiffs filed in said cause in the District Court of Waller County their Amended Petition, in which they claim to own the whole of such lands and seek to recover same in their entirety. But in the alternative they still seek to recover for monies expended thereon as set forth in their former pleadings.

In other words, Plaintiffs are claiming to have matured title by limitation to the whole of such lands while they were at the same time conceding in their pleadings in this case in the State Court that Defendants owned one-half thereof, and were seeking to recover from Defendants part of the expenditures alleged to have been made by Plaintiffs for the benefit of the whole title. This, under the Texas authorities, they may not do.

To cite all the cases would be such a large task that I quote the language of the Supreme Court of Texas from one of the earlier Texas decisions (Word v. Drouthett, 44 Tex. 369) (Emphasis mine):

"The possession must be exclusive, or, as it is generally expressed, it must be 'actual, continued, visible, notorious, distinct, and hostile.' (2 Smith's Lead. Cases, 561 et seq.) It must neither be abandoned, yielded up, or held in subordination to, recognition of, or dependent upon the will or right of another. He who would claim by reason of his adverse possession must, as has been said, '*Keep his flag flying.*' (19 Penn. St., 265). His entry upon the land must be with intent to claim it as his own or hold it for himself; or his intention to do so, if conceived after going into possession for some other purpose, must be manifested by some open or visible act or declaration showing such purpose, in order to set the statute in motion in his favor. (Wash.

on Real Prop., 125; 2 Smith's Lead. Cases, 561). *The possession must be fair and open, because 'the statute was not made to serve the purpose of artifice and trick.'* (Sailer v. Hertzogg, 2 Penn. St., 185)."

And I quote from one of the most recent cases (George Delany v. Margaret Jessie Patterson Padgett, et al., —Fed.—(2d)—, 5th Circuit), where in discussing adverse possession under the Texas Statutes of Limitation, it is said (Emphasis mine):

"These same authorities do, though, make it perfectly clear that the claim of right referred to in the statutes means a bold and open, a downright and persistent claim asserted not furtively by stealth and artifice, but openly, notoriously, unequivocally, adversely and continuously. Because this is so, the decisions under these statutes takes pains to leave in no doubt that if there is any break or chink in the armor of proof which a possessor must put and keep on when he undertakes to acquire a title by limitation, such as a single lisp of *acknowledgment*, the slightest uncertainty or equivocation in the openness and downrightness of his claim, the failure to comply precisely and exactly with the statutory provision, it is, and will be, fatal to the claim."

The pleadings of Plaintiffs filed herein as stated are more than *"lisps of acknowledgment"*. They are plain declarations and admissions that Defendants owned an undivided one-half interest in the land. See Warren v. Frederichs, 83 Tex. 384, 18 S.W. 750. Houston Oil Co. v. Pullen, 272 S.W. 439, where it is said:

"There are various ways by which the title of another may be recognized. For instance, as stated by counsel in the application for writ of error.

"'(1) By agreement to hold under another. Burrell v. Adams, 104 Tex. 183, 135 S.W. 1156; Weisman v. Thomson (Tex. Civ. App.), 78 S.W. 728. (2) By the taking or offering to take a lease. Gillean v. Frost, 25 Tex. Civ. App. 371, 61 S.W. 345. (3) By an offer to buy when it involves an admission of title. Mhoon v. Cain, 77 Tex. 317, 14 S.W. 24; Texas & N.O. R. Co. v. Speights, 94 Tex. 350, 60 S.W. 659; Schleicher v. Gatlin, 85 Tex. 270, 20 S.W. 121; Chapman v. Dickerson, (Tex. Civ. App.) 223 S.W. 318. (4) By a promise to pay rent for the use of the land. Gordon v. Gordon (Tex. Civ. App.) 224 S.W. 716. (5) by an admission that he claims no title. Warren v. Frederichs, 83 Tex. 384, 18 S.W. 750; McDonald v. McCrabb, 47 Tex. Civ. App. 259, 105 S.W. 238. (6) By an admission of title in another. Texas West. R. Co. v. Wilson, 83 Tex. 157, 18 S.W. 325; Beal v. Earhart (Tex. Civ. App.) 249 S.W. 1093; Thompson v. Richardson (Tex. Com. App.) 221 S.W. 952; Satterwhite v. Rosser, 61 Tex. 166; Whitaker v. Thayer, 38 Tex. Civ. App. 537, 86 S.W. 364; Gillean v. Frost, 25 Tex. Civ. App. 371, 61 S.W. 347; Texas & N.O. R. Co. v. Speights, 94 Tex. 350, 60 S.W. 659; Mass v. Bromberg, 28 Tex. Civ. App. 145, 66 S.W. 468. (7) And in various other ways. Corpus Juris, Vol. 2, p. 103, par. 142; Collins v. Megason (Tex. Civ. App.) 228 S.W. 585."

See also Brooks v. Phelps, 285 S.W. 904. Doherty v. Jensen, 174 S.W. (2d) 77.

But where, as here, the parties are Tenants in Common, the limitation claimant has a greater burden. Stiles vs. Hawkins, 207 S.W. 95. House v. Williams, 40 S.W. 414. Liddell v. Gordon, 254 S.W. 1099. Terry v. Terry, 228 S.W. 299.

It is clear that Plaintiffs have not acquired title to the entire property under the Texas Ten Year Statute of Limitation.